FILED

03 - 15 JUN 27 2003

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER.

-vs-

DARREL PETER PANDELI, AKA DARREL PETER FLORIAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (*Ring II*), this Court held that the Sixth Amendment entitles an Arizona capital murder defendant to have a jury, rather than a judge, determine the presence of at least one aggravating circumstance that renders the defendant death eligible. *Ring II* extended to capital cases the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2002), that the Sixth Amendment jury trial right applies to the determination of a fact that increases the sentencing range for a charged offense. *Id.*

Did the Arizona Supreme Court err by holding that *Ring II* requires not only a jury determination of an aggravating factor rendering the defendant eligible for the death penalty, but also a jury determination of the existence of mitigating circumstances and whether the mitigating circumstances are sufficiently substantial to warrant leniency?

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OPINION BELOW

On April 3, 2003, the Arizona Supreme Court vacated Darrel Pandeli's death sentence and remanded the case for resentencing upon finding that *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*), requires that a jury determine whether aggravating circumstances outweigh mitigating circumstances. *State v. Pandeli*, 65 P.3d 950, ¶¶ 9, 11 (Ariz. 2003). (Appendix A.)

The Arizona Supreme Court had previously upheld Pandeli's conviction and sentence on direct appeal, *State v. Pandeli*, 26 P.3d 1136 (Ariz. 2001), but while the case was pending certiorari review, this Court issued its ruling in *Ring II* and sent Pandeli's case back to the Arizona Supreme Court for further consideration in light of that ruling.

In determining whether *Ring II* error was harmless as applied to Pandeli, the Arizona Supreme Court found that one of the aggravating circumstances (a prior conviction of a serious offense) fell outside the purview of *Ring*, and that another aggravating circumstance (special cruelty, heinousness, or depravity) was supported by overwhelming and essentially uncontroverted evidence that Pandeli mutilated the victim's body after killing her. *Id.* at ¶¶ 8–9. The Arizona Supreme Court ruled, however, that, based on its view that *Ring II* error includes the weighing and balancing of aggravating and mitigating circumstances, the error was not harmless. Accordingly, the court remanded Pandeli's case to the trial court for resentencing. *Id.* at ¶¶ 10–11.[1]

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1. The Arizona Supreme Court's analysis regarding mitigation and *Ring II* error is set forth in an interim decision rendered in consolidated proceedings involving this case and the other Arizona cases pending direct appeal at the time *Ring II* was decided. *State v. Ring et al.*, 65 P.3d 915 (Ariz. 2003) (*Ring III*) (Appendix B).

STATEMENT OF JURISDICTION

Petitioner respectfully requests that a Writ of Certiorari issue to review the decision of the Arizona Supreme Court that vacated Pandeli's sentence and remanded the case for resentencing. The Arizona Supreme Court issued its decision on April 3, 2003. Petitioner timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a); and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

In October 1993, the State of Arizona charged Pandeli with two counts of first-degree murder. The first count involved the January 25, 1992, murder of Teresa Humphreys; the second count involved the September 24, 1993, murder of Holly Iler. The trial court severed the two counts prior to trial. This appeal relates to the Iler murder, for which Pandeli was convicted of first-degree murder and sentenced to death.[2]

The facts relating to the Iler murder are as follows: On September 24, 1993, Holly Iler's naked body was found in an alley near Pandeli's residence in Phoenix, Arizona. Ms. Iler's throat had been slashed, and both of her nipples had been cut off.

Pandeli and his friend Mark Cowan went to a topless bar the evening before Ms. Iler's body was found. At some point in the evening, before going their separate ways, Cowan left some clothes in Pandeli's van. When Cowan retrieved his belongings the next day, Pandeli mentioned having seen a dead woman near his home. After noticing blood spots on the shoes he had left in Pandeli's van, Cowan contacted the Phoenix Police Department.

Preliminary testing of the blood on the shoes showed that it was consistent with Holly Iler's blood. Police officers obtained a warrant to search Pandeli's residence and van, and they brought Pandeli to the Phoenix police station for questioning.

Pandeli initially denied any knowledge of the victim. Eventually, however, he told police detectives that he was in his van and had picked the victim up near 27th Avenue in Phoenix and paid her to have sex with him, but that he was unable to maintain an erection and decided

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2. In February 1996, in a separate case, Pandeli was convicted of second-degree murder for killing Ms. Humphreys, and the trial court sentenced Pandeli to an aggravated 20-year prison term. That conviction was affirmed on appeal to the Arizona Court of Appeals and the Arizona Supreme Court.

that he wanted his money back. He claimed that the victim came at him with a knife and that he had punched her in the chest and face a couple of times, then cut her neck. He admitted that he cut off the victim's nipples, then dumped her body in the alley near his residence. He stated that he had flushed the nipples down a toilet. Pandeli also told the detectives that he had thrown the knife he used in a dumpster, and that he had similarly thrown away bloody clothing and bedding.

The detectives asked Pandeli about his involvement in other killings, and he eventually acknowledged killing a black woman (Theresa Humphreys) 1½ years earlier. Pandeli stated that he had picked the woman up hitchhiking, and that she too had pulled a knife on him.

A serologist testified at trial that blood on items found in Pandeli's van and residence matched that of Holly Iler. A pathologist testified that Ms. Iler was 5' 1", and weighed 115 pounds. The pathologist further testified that the cause of Ms. Iler's death was an 8-inch incised wound to the neck, that appeared to have resulted from six or seven thrusting motions with a knife. Ms. Iler had also been suffocated or strangled for one to three minutes and had suffered a broken sternum and three major blows to the head before death.

After the jurors convicted Pandeli of first-degree murder, the trial court conducted a lengthy aggravation/mitigation hearing. The State presented evidence relating to aggravating circumstances under A.R.S. § 13–703(F)(2) (prior conviction of a serious offense), and § 13–703(F)(6) (murder committed in an especially cruel, heinous, or depraved manner). Pandeli did not dispute the (F)(2) factor in light of his prior conviction for murdering Theresa Humphreys.

As mitigation, Pandeli's counsel argued that Pandeli's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired under A.R.S. § 13–703(G)(1). Pandeli's counsel also offered as non-statutory mitigation Pandeli's dysfunctional family background; potential for rehabilitation in prison; the fact that he had contracted hepatitis C

(which would shorten his life); and residual doubt regarding premeditation.

On July 15, 1998, the trial court sentenced Pandeli to death. The trial court found that the State had established, beyond a reasonable doubt, the (F)(2) and (F)(6) aggravating circumstances. The trial court found that the murder was especially heinous or depraved because Pandeli had senselessly killed a victim whom he had already rendered totally helpless. The trial court found it "crystal clear from the evidence" that this murder involved gratuitous violence and needless mutilation.

With regard to mitigation, the trial court found that Pandeli established by a preponderance of the evidence that his family background, overall developmental history and mental and emotional health each constituted non-statutory mitigating circumstances, "though these circumstances are not near as compelling as represented and argued by [Pandeli]." The court also found as non-statutory mitigating circumstances that Pandeli had been a good prisoner, taught himself to read and became a minister (by mail) while in custody, that he professed remorse for the murder, and that he suffers from hepatitis C. The court found, however, that those mitigating circumstances were not sufficiently substantial to call for leniency.

The Arizona Supreme Court affirmed Pandeli's conviction and death sentence. *Pandeli*, 26 P.3d 1136, at ¶ 62. After considering "all mitigating factors, viewed separately or cumulatively," the court found that they "fail[ed] to provide sufficient reason to call for leniency in light of the prior murder of Humphreys, as well as the brutal circumstances of the Iler murder and the subsequent mutilation of her body." *Id.* at ¶ 83.

Pandeli filed a petition for writ of certiorari in this Court. While that petition was pending, this Court decided *Ring II*, holding Arizona's capital sentencing statute unconstitutional to the extent it required a judge, rather than a jury, to determine the presence or absence of aggravating factors required for imposition of the death penalty. This

Court vacated judgment and remanded Pandeli's case to the Arizona Supreme Court for further consideration in light of *Ring II*. *Pandeli v. Arizona*, 536 U.S. 830 (2002).

On July 17, 2002, the Arizona Supreme Court issued an order consolidating the instant case with other Arizona death penalty cases pending on direct review, and ordered briefing to address several issues relating to *Ring II*'s applicability to those cases. On April 3, 2003, the Arizona Supreme Court issued a ruling in the consolidated case, holding, among other things, that (1) capital sentences imposed under Arizona's prior capital sentencing scheme are subject to review for harmless error; (2) under *Ring II* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Sixth Amendment does not afford capital defendants the right to have a jury decide whether the State has established an aggravating circumstance based on the defendant's prior convictions; and (3) *Ring II* error includes the absence of a jury determination of mitigating circumstances and the weighing and balancing of aggravating and mitigating circumstances. Thus, there must be analysis of the harmlessness of findings regarding the existence of mitigation and whether mitigation is sufficient to warrant leniency. *Ring III*, 65 P.3d 915, ¶¶ 50, 63, 88–89.

On April 3, 2003, the Arizona Supreme Court applied those holdings to the instant case, vacating Pandeli's death sentence and remanding the case for resentencing. *Pandeli*, 65 P.3d 950 at ¶¶ 9, 11. The Arizona Supreme Court found that one of the aggravating circumstances at issue (a prior conviction of a serious offense) fell outside the purview of *Ring II*, and that the other aggravating circumstance (special cruelty, heinousness, or depravity), was supported by overwhelming and essentially uncontroverted evidence that Pandeli mutilated the victim's body after killing her. *Id.* at ¶¶ 8, 9. The court ruled, however, that, based on its view that *Ring II* error includes the weighing and balancing of aggravating and mitigating circumstances, the error was not harmless.

REASONS WHY THE WRIT SHOULD ISSUE

There is a conflict among the states regarding how to apply *Ring II*. The Arizona, Nevada, and Colorado Supreme Courts have broadly interpreted *Ring II* error to include the determination of mitigating circumstances and the weighing and balancing of aggravation and mitigation. That conclusion conflicts with rulings from courts in Delaware, Nebraska, Oklahoma, Alabama, Indiana, and Florida. This Court should accept review to clarify this confusion regarding the application of *Ring II*.

Ring II should not be interpreted as establishing a Sixth Amendment right to have a jury determine whether mitigating circumstances exist and whether mitigation is sufficiently substantial to warrant leniency. In *Ring II*, this Court noted that the issue presented was very narrow—whether an aggravating factor that makes a defendant death eligible may be found by the judge, or whether the Sixth Amendment's jury trial guarantee applies to that finding. *Ring II* was based on this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2002), that the jury trial guarantee extends to any fact that increases the sentencing range. In Arizona, a finding of at least one aggravating circumstance necessarily increases the sentencing range to include a possible death sentence. Thus, a jury finding (or a finding of harmless error) regarding the existence of at least one aggravating circumstance extends the sentencing range to include a possible death sentence and therefore satisfies *Ring II*.

Finally, the Arizona Supreme Court's ruling affects not only the instant case, but 26 other Arizona cases that were pending on direct review at the time this Court decided *Ring II*. This Court should accept review to avert unwarranted resentencing proceedings, with their concomitant costs to the State and to victims, in those cases.

ARGUMENTS

I.

THERE IS A CONFLICT AMONG THE STATES REGARDING WHETHER, UNDER *RING V. ARIZONA*, THE SIXTH AMENDMENT JURY TRIAL RIGHT IN CAPITAL CASE SENTENCING PROCEEDINGS EXTENDS BEYOND THE RIGHT TO A JURY DETERMINATION OF AN AGGRAVATING CIRCUMSTANCE THAT RENDERS THE DEFENDANT ELIGIBLE FOR THE DEATH PENALTY.

State courts have reached conflicting conclusions regarding the scope of *Ring II*. The Arizona Supreme Court held in the instant case that under *Ring II*, there is a Sixth Amendment right to a jury determination of whether mitigating circumstances exist and whether those circumstances are sufficiently substantial to warrant leniency. *Pandeli*, 65 P.3d 950, at ¶ 10. The Colorado Supreme Court recently reached the same conclusion in *Woldt v. Colorado*, 64 P.3d 256, 265–66 (Col. 2003), as did the Nevada Supreme Court in *Johnson v. Nevada*, 59 P.3d 450, 460 (Nev. 2002).

In contrast, the Delaware Supreme Court recently ruled that *Ring II* does *not* extend to the weighing phase of the capital sentencing process; once a jury finds a statutory aggravating circumstance that renders the defendant death eligible, a sentencing judge may weigh aggravating and mitigating circumstances. *Brice v. Delaware*, 815 A.2d 314, 322 (Del. 2003). The Nebraska Supreme Court has similarly ruled that *Ring II* does not afford capital defendants the right to have a jury weigh and balance aggravating and mitigating circumstances; those determinations fall outside the jury's "eligibility" decision and instead are part of the "selection decision," which can be performed by a judge without violating the Sixth Amendment. *Nebraska v. Gales*, 2003 WL 1571588 * 21 (Neb. 2003).

Alabama, Oklahoma, Florida, and Indiana courts have similarly rejected the notion that *Ring II* requires that a jury weigh aggravating and mitigating circumstances. In *Ex parte Waldrop*, 2002 WL 1001194 (Ala. Nov. 22, 2002), the Alabama Supreme Court upheld a judicial-override provision in Alabama's capital sentencing scheme that permits a judge to sentence a defendant to death notwithstanding a jury recommendation of life. The Alabama Supreme Court rejected, among other arguments, Waldrop's claim that, under *Ring II*, the process of deciding whether the aggravating circumstances outweigh the mitigating circumstances is a factual finding subject to the Sixth Amendment jury trial guarantee. 2002 WL 31630710, at * 7. *See also Ex parte Hodges v. State*, 2003 WL 1145451, *6, *7 (Ala. Mar. 14, 2003) (upholding judicial-override provision; because the defendant was eligible for the death penalty when the jury found that he committed the murder while he was engaged in a robbery, the subsequent determination by the trial court that the especially heinous, atrocious, or cruel factor was established and that aggravating circumstances outweighed the mitigating circumstances did not implicate *Ring II* or *Apprendi*); *State v. Torres*, 58 P.3d 214 (Crim. App. Okla. 2002) (rejecting claim that *Ring II* precludes an appellate court from reweighing the evidence of aggravating and mitigating circumstances after invalidating an aggravating circumstance: "Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that *Ring [II]* requires."); *Bottoson v. Moore*, 2002 WL 31386790 (Fla. Oct. 24, 2002) (per curiam opinion analyzing effect of *Ring II* on Florida statutory scheme and denying post-conviction relief based on *Ring II*; two Justices concurred only because one of the four aggravators found in connection with the murder was Bottoson's prior conviction of a crime involving the threat of violence—an aggravator that need not be found by the jury under *Almendarez-Torres*); *Wrinkles v. State*, 776 N.E.2d 905, 907–08 (Ind. 2002) (multiple murders aggravating circumstance implicit in jury's verdict; therefore *Ring II* is not implicated).

Given the clear conflict in the way state courts have interpreted this Court's Sixth Amendment analysis in *Ring II*, this Court should accept certiorari review in the instant case to provide guidance and clarity.

II.

THE ARIZONA SUPREME COURT ERRED BY FINDING THAT *RING V. ARIZONA* ESTABLISHES A SIXTH AMENDMENT RIGHT TO HAVE A JURY ASSESS WHETHER MITIGATING CIRCUMSTANCES EXIST AND WHETHER THE MITIGATING CIRCUMSTANCES ARE SUFFICIENT TO WARRANT LENIENCY.

In *Ring II*, this Court held that Arizona's death penalty sentencing statute offended the Sixth Amendment to the extent it required a judge, rather than a jury, to determine the presence or absence of an aggravating circumstance that renders a first-degree murder defendant eligible for the death penalty. Based on *Apprendi*'s holding that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, this Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in which this Court had rejected the same Sixth Amendment challenge to Arizona's statute (A.R.S. § 13–703). *Ring II*, 536 U.S. at 609.

The Arizona Supreme Court has interpreted *Ring II* too broadly. This Court's analysis in *Ring II* focused on whether a finding that an aggravating factor existed *increased the range of sentence* the defendant faced. *See* 536 U.S. at 602. The Arizona Supreme Court had indicated in *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001) (*Ring I*), that "the death sentence becomes possible only after the trial judge makes a factual finding that *at least one* aggravating factor is present." (Emphasis added.)

Relying on the Arizona Supreme Court's interpretation of Arizona law, this Court found that Arizona's first-degree murder statute authorized a maximum penalty of death "only in a formal sense." This Court stated:

> A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that *a statutory aggravating factor exists*. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.
>
> . . .
>
> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. This was so because, in Arizona, a "death sentence may not legally be imposed . . . unless *at least one aggravating factor* is found to exist beyond a reasonable doubt."

536 U.S. at 596 (internal quotes omitted, emphasis added). This Court thus held that "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." 536 U.S. at 604 (quoting *Apprendi*, 530 U.S. at 494).

Apprendi similarly focused on whether a court could impose a sentence *beyond the range* authorized by the jury's verdict. Apprendi pled guilty to possession of a firearm for an unlawful purpose, a crime designated in New Jersey's substantive criminal statute as a second-degree offense, punishable under New Jersey's felony sentencing statute by a 5 to 10-year prison term. *Apprendi*, 530 U.S. at 468–70. The charging instrument made no reference to a third New Jersey statute aimed at hate crime, which enhanced the sentencing range from the second-degree to first-degree level (from 10 to 20 years) upon a finding by the sentencing court (by a preponderance of the evidence) that the defendant committed the crime with a racially biased purpose. *Id.* at 469. The New Jersey trial court made such a finding and imposed a 12-year sentence, which two state appellate courts subsequently upheld. *Id.* at 471.

This Court determined that Apprendi had a constitutional right to a jury finding on the issue of racial bias, and held that enhancement under New Jersey's hate crime statute violated the Sixth Amendment right to a jury trial because it effectively convicted Apprendi of a greater, uncharged offense. *Id.* at 475–76, 494 n.19. Confirming a principle previously set forth in *Jones (Nathaniel) v. United States*, 526 U.S. 227 (1999), this Court stated:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

Apprendi, 530 U.S. at 490 (citing *Jones*, 526 U.S. at 252–53). This Court was careful to point out, however, that not every factual determination relating to sentencing need be found by a jury:

> We should be clear that nothing in this [common-law] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. *See e.g., Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949) . . . .

530 U.S. at 481 (emphasis in original).

In the consolidated proceedings conducted by the Arizona Supreme Court following *Ring II*, the State argued that the court should uphold capital sentences imposed under Arizona's disapproved, former statute in three circumstances: (1) where the jury implicitly found one aggravating factor, (2) where the trial judge found one factor

established by overwhelming and essentially uncontroverted evidence, or (3) where the aggravator was outside the purview of *Ring II*. Any one of these findings renders the defendant "death eligible" based on the presence of one aggravating factor. The State posited that nothing in *Ring II* prevents a trial judge from finding additional aggravating circumstances, as well as finding mitigating circumstances and balancing them against the aggravating circumstances.

The Arizona Supreme Court rejected the State's argument. The court acknowledged that "[a] narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors," but nevertheless concluded that *Ring II* requires a jury to consider all aggravating factors urged by the State. The Arizona Supreme Court further noted that the death penalty could not have been imposed under the statute in place when Pandeli was sentenced unless the trial court, acting as the sentencer, concluded that mitigating factors were not sufficiently substantial to call for leniency. The court thus held that an analysis of *Ring II* error includes a determination of the mitigating circumstances and whether those circumstances outweigh the aggravating circumstances. *Ring III*, 65 P.3d 915, ¶ 88–89, *Pandeli*, 65 P.3d 950, ¶10.

The Arizona Supreme Court's expansive reading of *Ring II* is unwarranted given the narrow scope of the issue addressed in *Ring II*:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized

> between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

536 U.S. at 597 n.4. Furthermore, both *Ring II* and *Apprendi* focused exclusively on a Sixth Amendment requirement that the jury make factual findings that set the outer limits of the sentencing *range*. Neither case established a Sixth Amendment basis for requiring a jury to make the ultimate sentencing decision; such a requirement was urged only by Justice Breyer in a concurring opinion. *Ring II*, 536 U.S. at 614 (J. Breyer, concurring based on his belief that the Eighth Amendment mandates jury sentencing in capital cases). Thus, when a state court finds that an aggravating circumstance is outside the purview of *Ring II*, or that *Ring II* error relating to one aggravating circumstance is harmless, that finding satisfies the Sixth Amendment requirements set forth in *Ring II* and *Apprendi*.

In the present case, one of the aggravators found by the trial court, and again by the Arizona Supreme Court on independent review, was a prior conviction of a serious offense (murder). In the post-*Ring II* remanded proceedings in this case, the Arizona Supreme Court expressly found that there was no error with regard to the prior convictions aggravator under the rationale set forth in *Almendarez-Torres*. *Ring III*, 65 P.3d 915, ¶¶ 63–64; *Pandeli*, 65 P.3d 950, ¶ 7. Given that ruling by the Arizona Supreme Court, *Ring II* was satisfied, and there was no need for an analysis of whether error relating to the lack of a jury finding regarding a second aggravator or the weighing of aggravation and mitigation was harmless.

This Court's decision in *United States v. Harris*, 536 U.S. 545 (2002), decided the same day as *Ring II*, supports the conclusion that the finding of any one aggravating circumstance satisfies the Sixth Amendment requirement set forth in *Ring II*. In *Harris*, this Court rejected a claim that the Sixth Amendment requires a jury finding of a fact (the defendant brandished a gun during the commission of the offense) increasing the statutory minimum sentence. 536 U.S. at 554. This Court observed that, unlike a statutory factor that increases the maximum penalty for the defendant's crime, a statutory factor setting a mandatory minimum "ha[s] an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion." *Id.* This Court further noted that the brandishing statute "does not authorize the judge to impose 'steeply higher penalties'—or higher penalties at all—once the facts in question are found." *Id.*

This Court also reiterated its pronouncement in *Jones* that "[i]t is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." *Harris*, 536 U.S. at 558 (citing *Jones*, 526 U.S. at 248). This Court then held that "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Id.*

In the present case, findings regarding mitigation likewise operated to "constrain, rather than extend, the sentencing judge's discretion." Once the sentencing range included a possible death sentence based on the presence of at least one statutory aggravating circumstance, there was no *Ring II/Apprendi* error when the trial or appellate court balanced aggravating and mitigating circumstances. *See also Zant v. Stephens*, 462 U.S. 862 (1983) (holding that in a state where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one

aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury).

Finally, *Ring II* error should be narrowly interpreted because it does not go to the fairness or reliability of the sentencing process. The sentencing error in *Ring II* and in the instant case was that a fair and impartial judge, rather than a fair and impartial jury, determined the existence of aggravating circumstances under A.R.S. § 13–703. The error at issue did not implicate the fundamental fairness of the process, and there is not a compelling basis for broadening this Court's holding in *Ring II* beyond the scope of that decision.

In *United States v. Cotton*, 535 U.S. 625, 632–34 (2002), this Court noted the injustice that would result if a sentence were to be reversed on error that "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." Such an injustice will occur in the instant case if a resentencing proceeding is required. Given the Arizona Supreme Court's conclusion that no *Ring II* error arose from the finding of the prior conviction aggravator and that the evidence relating to the second aggravator (special cruelty, heinousness, or depravity) was overwhelming and essentially uncontroverted, there is no inherent unfairness to the defendant in ending the harmless error inquiry there. The real threat to the "fairness, integrity, and public reputation of judicial proceedings" would be to require a resentencing in this case notwithstanding a finding of harmlessness as to aggravating factors that set the outer limits of the sentencing range to include a possible death sentence.

CONCLUSION

There is a conflict among the states regarding whether, under *Ring II*, the Sixth Amendment jury trial guarantee is satisfied in a capital case when there is a jury finding (or a finding of harmless error) relating to the existence of an aggravating circumstance that makes the defendant eligible for the death penalty. This Court should accept certiorari review to address that conflict and to reject the Arizona Supreme Court's finding that the Sixth Amendment requires a jury in a capital case to determine whether mitigating circumstances exist and to weigh mitigation and aggravation. Accordingly, and based on the foregoing authority and arguments, the State of Arizona respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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CRM96–0913
114801

APPENDICES

APPENDIX A

[Filed April 3, 2003]

IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Supreme Court
	)	No. CR 98-0376-AP
Appellee,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR-93-08116
DARREL PETER PANDELI, aka	)	
DARREL PETER FLORIAN,	)	**SUPPLEMENTAL**
	)	**OPINION**
Appellant.	)	

Appeal from the Superior Court in Maricopa County
No. CR-93-08116
The Honorable Gregory H. Martin, Judge

REMANDED FOR RESENTENCING

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Julie S. Hall — Tucson
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by Jennifer Bedier
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Darrel Peter Florian

McGregor, Vice Chief Justice

¶1 Defendant Darrel Peter Pandeli (Pandeli) was convicted by a jury of first degree murder and was sentenced to death by the trial judge. The case came before us on direct review, pursuant to Rules 26.15 and 31.2 of the Arizona Rules of Criminal Procedure and Arizona Revised Statutes (A.R.S.) section 13-4031 (2001).

¶2 This court filed an opinion affirming Pandeli's conviction and death sentence. *State v. Pandeli,* 200 Ariz.. 365, 26 P.3d 1136 (2001). The United States Supreme Court vacated the judgment and remanded for further consideration in light of *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428 (2002) *(Ring II)* . *Pandeli v. Arizona,* __ U.S. __, 122 S. Ct. 2654 (2002) (mem.) . The *Ring II* decision does not affect our original opinion with respect to factual, procedural, and guilt issues, so we need not reconsider those portions of our original opinion. In this supplemental opinion, we reconsider Pandeli's sentence in light of *Ring II.*

I.

¶3 In *Ring II,* the United States Supreme Court held that Arizona's former capital sentencing scheme[1] violates the right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution. *Ring II,* 536 U.S. at __, 122 S. Ct. at 2443. The Court declared that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature

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[1] The legislature has since amended A.R.S. § 13—703. See 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

conditions an increase in their maximum punishment." *Id.* at —, 122 S. Ct. at 2432. The Court reversed our decision in *State v. Ring,* 200 Ariz. 267, 25 P.3d 1139 (2001) *(Ring I)*, and remanded for further proceedings consistent with its decision. *Ring II,* 536 U.S. at , 122 S. Ct. at 2443.

¶4 Following the Supreme Court's *Ring II* decision, we consolidated all death penalty cases in which this court had not yet issued a direct appeal mandate to determine whether *Ring II* requires this court to reverse or vacate the defendants' death sentences. In *State v. Ring,* __ Ariz. __, __ ¶ 53, __ P.3d , __ (2003) *(Ring III),* we held that we will examine a death sentence imposed under Arizona's superseded capital sentencing statutes for harmless error.

II.

¶5 The State charged Pandeli with two counts of premeditated murder: count one for the murder of Teresa Humphreys and count two for the murder of Holly Iler. Pandeli murdered Humphreys more than a year before he murdered Iler. The trial court severed the two counts, which were tried before separate juries. In February of 1996, a jury convicted Pandeli of second degree murder for killing Teresa Humphreys. The trial court sentenced him to twenty years in prison.

¶6 In July of 1997, a jury convicted Pandeli of first degree murder for killing Holly Iler. Following the jury's verdict, the trial judge conducted a sentencing hearing to determine whether any aggravating and mitigating circumstances existed. A.R.S. § 13-703 (2001) . At trial, the State advanced two aggravating circumstances: (1) a previous conviction of a serious crime, A.R.S. section 13-703.F.2 (2001) and (2) the murder was committed in an especially heinous, cruel, or depraved manner. *Id. §* 13-703.F.6. The trial court found each factor beyond a reasonable doubt.

¶7 The F.2 aggravating circumstance applies if the state proves beyond a reasonable doubt that a defendant has been convicted of a serious

offense, which includes second degree murder. *Id.* § 13-703.F.2;[2] *Id.* § 13-703.H.1. In 1996, a jury convicted Pandeli of second degree murder for killing Teresa Humphreys. This aggravating circumstance falls outside the *Ring II* mandate. The Sixth Amendment does not require a jury to determine the existence of an F.2 prior conviction. *Ring III,* __ Ariz. at __ ¶¶ 63-64, __ P.3d at __.

¶8 To establish the F.6 aggravating circumstance, the state must prove that the manner in which a defendant killed the victim was especially heinous, cruel, or depraved. A.R.S. § 13-703.F.6. The state needs to prove only *one* of the heinous, cruel, or depraved factors for this aggravating circumstance to apply. *State v. Gretzler,* 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983) . The terms heinous and depraved refer to the "'mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Clark,* 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980). Post-mortem mutilation indicates "a mental state that is "marked by debasement'" and supports a finding of especially heinous or depraved. See *State v. Vickers,* 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981).

¶9 At Pandeli's trial, the medical examiner testified that Iler's nipples were excised post-mortem, explaining that it took at least four strokes of a knife to sever the right nipple and at least two, possibly three, strokes to sever the left nipple. In his confession to the police, Pandeli admitted both to killing Iler and to removing her nipples after she died. According to Pandeli, he either threw the nipples in the garbage or flushed them down the toilet. Although the State did not present the confession during the guilt phase, the trial court admitted the confession into evidence during the sentencing phase. Given these overwhelming

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[2] The version of A.R.S. section 13-703.F.2 making a prior conviction "of a serious offense, whether preparatory or completed" an aggravating circumstance became effective on July 17, 1993. Pandeli murdered Holly Iler on September 23, 1993. Thus, this version of the statute governed Pandeli's case. A.R.S. § 1-246 (2002); State *v. Newton,* 200 Ariz. 1, 2 91 3, 21 P.3d 387, 388 (2001) ("A basic principle of criminal law requires that an offender be sentenced under the laws in effect at the time he committed the offense for which he is being sentenced.").

and essentially uncontroverted facts, the State can make a strong argument that no reasonable jury could fail to find the F.6 factor. *See Ring III,* __ Ariz. at __ 91 93, __ P.3d at __.

¶10 As we explained in *Ring III,* however, our harmless error inquiry does not end with considering aggravating circumstances. *Id.* We also must consider whether reversible error occurred with respect to the mitigating circumstances. *Id.* The trial judge found no statutory mitigating circumstances and considered Pandeli's family background, his overall developmental history, his good behavior while incarcerated, his mental or emotional health, and remorse as non-statutory mitigating circumstances. The defense presented an expert who diagnosed Pandeli as suffering from paranoid schizophrenia and post traumatic stress disorder and testified that these disorders could have contributed to Pandeli's conduct. Although the State's expert strongly contradicted this testimony, we cannot say, beyond a reasonable doubt, that a reasonable jury hearing the same evidence as did the judge would have assessed the defense expert's testimony as did the judge and would have failed to find mental impairment, a statutory mitigating circumstance. A.R.S. § 13-703.G.1. A different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are "'sufficiently substantial to call for leniency." *Id. §* 13-703.5.

III.

¶11 For the foregoing reasons, we cannot conclude that the *Ring II* error was harmless in this case. Accordingly, we vacate Pandeli's death sentence and remand for resentencing under A.R.S. sections 13-703 and 13-703.01 (Supp. 2002)

Ruth V. McGregor, Vice Chief Justice

CONCURRING:

Rebecca White Berch, Justice
Michael D. Ryan, Justice

Jones, Chief Justice, specially concurring

¶12 I concur in the result. On the question whether harmless error analysis is appropriate in the case before us, see *State v. Ring*, __ Ariz. at __ ¶¶ 105-15, __ P.3d at __ (2003) (Feldman, J., concurring in part and dissenting in part).

Charles S. Jones, Chief Justice

APPENDIX B

[Filed April 3, 2003]

SUPREME COURT OF ARIZONA

En Banc

STATE OF ARIZONA, Appellee, v. TIMOTHY STUART RING, Appellant.	)	Arizona Supreme Court No. CR-97-0428-AP Maricopa County Superior Court No. CR-95-01754(A) CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. ANTOIN JONES, Appellant.	)	Arizona Supreme Court No. CR-99-0536-AP Maricopa County Superior Court No. CR-96-04691 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. DANNY N. MONTAÑO,	)	Arizona Supreme Court No. CR-99-0439-AP Pima County Superior Court No. CR-58016 CONSOLIDATED WITH

Appellant.	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-00-0328-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR 98-04885
WAYNE BENOIT PRINCE,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-00-0360-AP
Appellee,	)	
	)	Mohave County Superior
v.	)	Court
	)	No. CR-98-838
MICHAEL GENE BLAKLEY,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-00-0447-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR1997-011695
HENRY WILLIAM HALL,	)	
	)	CONSOLIDATED WITH
Appellant.	)	

STATE OF ARIZONA, Appellee, v. SHAWN RYAN GRELL, Appellant.	Arizona Supreme Court No. CR-01-0275-AP Maricopa County Superior Court No. CR1999-095294 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. JAMES EDWARD DAVOLT, II, Appellant.	Arizona Supreme Court No. CR-00-0508-AP Mohave County Superior Court No. CR-98-1243 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. LEROY D. CROPPER, Appellant.	Arizona Supreme Court No. CR-00-0544-AP Maricopa County Superior Court No. CR97-03949 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. SHAD DANIEL ARMSTRONG, Appellant.	)	Arizona Supreme Court No. CR-00-0595-AP Pima County Superior Court No. CR-61846 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. EUGENE ROBERT TUCKER, Appellant.	)	Arizona Supreme Court No. CR-01-0091-AP Maricopa County Superior Court No. CR1999-015293 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. KAJORNSAK PRASERTPHONG, Appellant.	)	Arizona Supreme Court No. CR-01-0100-AP Pima County Superior Court No. CR-64663 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. CHRISTOPHER BO HUERSTEL, Appellant.	)	Arizona Supreme Court No. CR-01-0103-AP Pima County Superior Court No. CR-64663 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. SHERMAN LEE RUTLEDGE, Appellant.	)	Arizona Supreme Court No. CR-01-0129-AP Maricopa County Superior Court No. CR1997-05555
STATE OF ARIZONA, Appellee, v. CHRISTOPHER GEORGE THEODORE LAMAR, Appellant.	)	Arizona Supreme Court No. CR-01-0270-AP Maricopa County Superior Court No. CR1996-011714 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. MICHAEL JOE MURDAUGH (A), Appellant.	)	Arizona Supreme Court No. CR-01-0421-AP Maricopa County Superior Court No. CR1995-006472 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. BRIAN JEFFREY DANN, Appellant.	)	Arizona Supreme Court No. CR-02-0042-AP Maricopa County Superior Court No. CR-1999-003536 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. ROBERT JOE MOODY, Appellant.	)	Arizona Supreme Court No. CR-02-0044-AP Pima County Superior Court No. CR-43804 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. KEITH ROYAL PHILLIPS, Appellant.	)	Arizona Supreme Court No. CR-99-0296-AP Pima County Superior Court No. CR-61452 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. MARCUS LASALLE FINCH, Appellant.	)	Arizona Supreme Court No. CR-99-0551-AP Pima County Superior Court No. CR-61452 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. JOHN EDWARD SANSING, Appellant.	)	Arizona Supreme Court No. CR-99-0438-AP Maricopa County Superior Court No. CR-98-003520 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. JAMES CORNELL HARROD, Appellant.	)	Arizona Supreme Court No. CR-98-0289-AP Maricopa County Superior Court No. CR-95-09046 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. DARREL PETER PANDELI aka DARREL PETER FLORIAN, Appellant.	)	Arizona Supreme Court No. CR-98-0376-AP Maricopa County Superior Court No. CR-93-08116 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. SCOTT ALAN LEHR, Appellant.	)	Arizona Supreme Court No. CR-97-0317-AP Maricopa County Superior Court No. CR 92-05731 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. ARTURO ANDA CAÑEZ, Appellant.	Arizona Supreme Court No. CR-98-0488-AP Pinal County Superior Court No. CR-96-021235 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. AARON SCOTT HOSKINS, Appellant.	Arizona Supreme Court No. CR-97-0349-AP Maricopa County Superior Court Nos. CR-94-11396 and CR-94-11397 (Consolidated) CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. SCOTT DOUGLAS NORDSTROM,	Arizona Supreme Court No. CR-98-0278-AP Pima County Superior Court No. CR-55947

Appellant.)
) **OPINION**

Appeal from the Superior Court of Maricopa County
No. CR-95-01754(A)
The Honorable Gregory H. Martin, Judge

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Appeal from the Superior Court of Maricopa County
No. CR-96-04691
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Pima County
No. CR-58016
The Honorable Deborah J. S. Ward, Judge Pro Tempore

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Appeal from the Superior Court of Maricopa County
No. CR 98-04885
The Honorable Michael R. McVey, Judge

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Appeal from the Superior Court of Mohave County
No. CR-98-838
The Honorable Steven F. Conn, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1997-011695
The Honorable Thomas W. O'Toole, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1999-095294
The Honorable Barbara M. Jarrett, Judge

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Appeal from the Superior Court of Mohave County
No. CR-98-1243
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Appeal from the Superior Court of Maricopa County
No. CR97-03949
The Honorable David R. Cole, Judge

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Appeal from the Superior Court of Pima County
No. CR-61846
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Appeal from the Superior Court of Maricopa County
No. CR1999-015293
The Honorable Michael D. Jones, Judge

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Appeal from the Superior Court of Pima County
No. CR-64663
The Honorable Michael Brown, Judge

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The Honorable Michael Brown, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1997-05555
The Honorable Frank T. Galati, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1996-011714
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1995-006472
The Honorable Sherry Hutt, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 1999-003536
The Honorable H. Jeffrey Coker, Judge

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Appeal from the Superior Court of Pima County
No. CR-43804
The Honorable Michael Cruikshank, Judge

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Appeal from the Superior Court of Pima County
No. CR-61452
The Honorable Bernardo P. Velasco, Judge

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Appeal from the Superior Court of Pima County
No. CR-61452
The Honorable Bernardo P. Velasco, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 98-003520
The Honorable Ronald S. Reinstein, Judge

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No. CR-95-09046
The Honorable Ronald S. Reinstein, Judge

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No. CR-93-08116
The Honorable Gregory H. Martin, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 92-05731
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Pinal County
No. CR-96-021235
The Honorable Boyd T. Johnson, Judge

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Appeal from the Superior Court of Maricopa County
Nos. CR-94-11396 and CR-94-11397 (Consolidated)
The Honorable Jeffrey A. Hotham, Judge

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Appeal from the Superior Court of Pima County
No. CR-55947
The Honorable Michael Cruikshank, Judge Pro Tempore

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M c G R E G O R, Vice Chief Justice

¶1 This case comes to us on remand from the United States Supreme Court, *Ring v. Arizona*, 536 U.S. 584, ___, 122 S. Ct. 2428, 2443 (2002) (*Ring II*). We have jurisdiction pursuant to the Arizona Constitution, Article VI, Section 5.3.

I.
Facts and Procedural History.

¶2 On December 6, 1996, a jury convicted Timothy Stuart Ring of first degree murder, conspiracy to commit armed robbery, armed robbery, burglary and theft. Under Arizona law at the time of Ring's sentencing, capital sentencing followed the procedure set forth at Arizona Revised Statutes (A.R.S.) section 13-703 (Supp. 1996). As required by A.R.S. section 13-703.B, the trial court conducted a sentencing hearing to consider aggravating and mitigating circumstances. The court could consider only those aggravating factors identified by statute, but could consider any possible mitigating factor.[1] A.R.S. § 13-703.F–.G, *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1. After the hearing, the court found two aggravating factors: Ring committed the murder for pecuniary gain, A.R.S. section 13-703.F.5, and "in an especially

[1] The state must prove aggravating factors beyond a reasonable doubt. A.R.S. § 13-703.B (Supp. 2002); *State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). Mitigating factors must be proved by a preponderance of the evidence. A.R.S. § 13-703.C; *State v. Pandeli*, 200 Ariz. 365, 376 ¶ 44, 26 P.3d 1136, 1147 (2001). Except for one brief period, aggravating circumstances have been codified at A.R.S. section 13-703.F since the legislature enacted judge-based sentencing. Following the 2001 Arizona Legislative Session, these aggravating circumstances are listed under A.R.S. section 13-703.G. 2001 Ariz. Sess. Laws ch. 260, § 1. The legislature redesignated aggravating circumstances under subsection .F in its post-*Ring II* amendments. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

heinous, cruel or depraved manner," A.R.S. section 13-703.F.6. *State v. Ring*, 200 Ariz. 267, 272 ¶ 13, 25 P.3d 1139, 1144 (2001) (*Ring I*). The trial court concluded that the mitigating circumstance of Ring's minimal criminal record was not "sufficiently substantial to call for leniency" and sentenced Ring to death. *Id.* at 273 ¶ 13, 25 P.3d at 1145; *see* A.R.S. § 13-703.E, *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

¶3 Ring subsequently filed a direct appeal to this court seeking review of multiple trial and sentencing issues, including a Sixth Amendment challenge to Arizona's capital sentencing procedure. The Sixth Amendment right to a jury trial, Ring argued, requires a jury, rather than a judge, to find the aggravating factors set forth at section 13-703.F. *Ring I,* 200 Ariz. at 278 ¶ 40, 25 P.3d at 1150. This court affirmed Ring's first degree murder conviction and death sentence. *Id.* at 284 ¶ 65, 25 P.3d at 1156. Guided by the United States Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), we held Arizona's capital sentencing procedure did not violate the Sixth Amendment of the United States Constitution. *Ring I*, 200 Ariz. at 279-80 ¶ 44, 25 P.3d at 1151-52.

¶4 Ring petitioned the United States Supreme Court to accept *certiorari*. The Court granted review and held that Arizona's capital sentencing scheme violated the Sixth Amendment right to a jury trial, overruling *Walton* and applying the approach of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. The Supreme Court remanded the matter for disposition in light of *Ring II*.

¶5 At the time of the *Ring II* decision, thirty-one defendants sentenced to death had matters pending on direct appeal before this court. On June 27, 2002, we entered an order consolidating all thirty-one death penalty cases then on direct appeal. *State v. Ring*, Order No. CR-97-0428-AP (June 27, 2002).

¶6 All defendants in this consolidated case either pled guilty to or

were convicted by a jury of first degree premeditated or felony murder. Trial judges sentenced all defendants to death under a now-superseded version of A.R.S. section 13-703, under which a judge considered aggravating and mitigating evidence. This court must now examine the impact of *Ring II* on the death sentences of those defendants before us. To assist the court, and after consultation with counsel for the State and the defendants, we ordered the parties to brief the issues discussed below. We reserved to each defendant the right to further brief sentencing issues, if necessary. This opinion addresses those issues raised in the consolidated appeal. The court will address each defendant's sentencing issues in a separate opinion.

II.

Historical Overview of Capital Punishment in Arizona.

¶7 Under Arizona's first penal code, a person convicted of first degree murder received either a death or prison sentence.[2] Revised Statutes of Arizona, Penal Code § 173 (1913). The jury, exercising its discretion, decided which punishment to impose. *Id.* In 1918, voters approved an initiative measure giving the trial judge authority to sentence a person to death for first degree murder in cases in which the defendant pled guilty. 1919 Ariz. Sess. Laws, Initiative & Referendum Measures 17, 18. In those cases, the trial court exercised the same discretion as did a jury. Thus, until the early 1970s, Arizona imposed the death penalty for first degree murder at the sole discretion of the jury or court. *E.g.*, Ariz. Code § 43-2903 (1939); Ariz. Code § 4585 (1928); *State v. McGee*, 91 Ariz. 101, 111-12, 370 P.2d 261, 268 (1962) ("The determination of punishment is wholly within the discretion of the jury upon their consideration of all aspects of the case."), *superseded by statute as stated in State v. Lopez*, 163

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[2] In addition to first degree murder, offenses punishable by death included treason, Revised Statutes of Arizona, Penal Code section 33 (1913), train robbery, *id.* sections 435, 438, and deadly assault by a felon serving a life sentence, *id.* section 220.

Ariz. 108, 115, 786 P.2d 959, 966 (1990); *Hernandez v. State*, 43 Ariz. 424, 429, 32 P.2d 18, 20 (1934) ("[T]he question of punishment in first degree murder cases is wholly within the jury's discretion . . . ."). No statutory standards guided the determination of punishment.

¶8 In 1972, however, the United States Supreme Court decided *Furman v. Georgia* and held that standardless death sentencing procedures violate the Eighth Amendment's prohibition of cruel and unusual punishment. 408 U.S. 238, 239-40, 92 S. Ct. 2726, 2727 (1972) (per curiam). According to Justice Stewart, complete jury discretion led to arbitrary and capricious imposition of the death sentence; given strikingly similar crimes, some defendants received a death sentence and others did not. *Id.* at 309-10, 92 S. Ct. at 2762 (Stewart, J., concurring).

¶9 Following the *Furman* decision, the Arizona Legislature enacted a new capital sentencing scheme. 1973 Ariz. Sess. Laws ch. 138. The legislation divided a capital first degree murder trial into two phases: a guilt phase and a sentencing phase. Upon a jury conviction of or a guilty plea to first degree murder, the statutes required the trial court to hold a sentencing hearing at which the state and defendant presented evidence of statutorily defined aggravating and mitigating factors.[3] *Id.* § 5. The trial court could impose the death sentence if it found at least one aggravating circumstance and "no mitigating circumstances sufficiently substantial to call for leniency." *Id.*

¶10 Three years later, in *Gregg v. Georgia*, the Supreme Court upheld Georgia's revised sentencing scheme against a claim that the

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[3] In 1978, the Supreme Court held unconstitutional those death penalty sentencing statutes limiting the types of mitigating evidence a defendant can introduce. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978); *Bell v. Ohio*, 438 U.S. 637, 642, 98 S. Ct. 2977, 2980-81 (1978). This court subsequently held unconstitutional Arizona's exclusion of nonstatutory mitigating circumstances. *State v. Watson*, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978). In 1979, the Arizona Legislature amended the mitigating circumstances statute to conform with these decisions. 1979 Ariz. Sess. Laws ch. 144, § 1.

death penalty was *per se* unconstitutional. 428 U.S. 153, 169, 96 S. Ct. 2909, 2923 (1976). The Georgia statute resembled Arizona's, except that, under Georgia law, the same jury heard both the guilt and sentencing phases. *See id.* at 164 & n.9, 96 S. Ct. at 2921 & n.9.

¶11 The Supreme Court reviewed Arizona's judge-only sentencing in *Walton*. The Court rejected an argument that the Sixth Amendment right to a jury trial required a jury, not a judge, to find the facts presented at the sentencing hearing. *Walton*, 497 U.S. at 649, 110 S. Ct. at 3055. In *Apprendi*, a non-capital case decided ten years later, the Court held that "[o]ther than the fact of a prior conviction, any fact that
increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63. Although Justice O'Connor's *Apprendi* dissent questioned whether *Walton* could survive the *Apprendi* ruling, *id.* at 537, 120 S. Ct. at 2387-88 (O'Connor, J., dissenting), the majority distinguished capital cases as "not controlling" authority. *Id.* at 496-97, 120 S. Ct. at 2366.

¶12 Finally, in *Ring II*, the Supreme Court expressly overruled *Walton* in favor of *Apprendi*'s Sixth Amendment approach. 536 U.S. at ___, 122 S. Ct. at 2443. According to the Court, "[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19, 120 S. Ct. at 2365 n.19). "Capital defendants, no less than non-capital defendants," the Court concluded, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at ___, 122 S. Ct. at 2432. Thus, any fact necessary to enhance the defendant's sentence beyond that authorized by the jury's guilty verdict must be found by the jury.

¶13 Following the Supreme Court's announcement of the *Ring II* decision, Governor Jane Dee Hull called a special legislative session

to revise Arizona's capital sentencing provisions. On August 1, 2002, the legislature passed and Governor Hull signed into law Senate Bill ("S.B.") 1001, containing several revisions intended to conform Arizona law to the *Ring II* mandate. S.B. 1001, 45th Leg., 5th Spec. Sess. (Ariz. 2002). Under Arizona's amended sentencing procedure, the jury serving during the guilt phase of the trial also serves as the trier of fact during the sentencing phase. A.R.S. § 13-703.01.C-.D (Supp. 2002). Specifically, the jury will find and consider the effect of aggravating and mitigating circumstances and decide whether the defendant should receive a sentence of death. *Id.* § 13-703.01.D.

¶14 To determine whether we should vacate defendants' death sentences and either reduce to a life sentence or remand for resentencing under Arizona's revised procedure, we consider the following issues.

III.

Does the Ex Post Facto Clause Prohibit Resentencing Under Arizona's Amended Capital Sentencing Procedure?

¶15 The defendants argue that resentencing under A.R.S. sections 13-703 and 13-703.01 (Supp. 2002) (the new sentencing statutes) would constitute an ex post facto violation under the United States Constitution, Article I, Section 10, Clause 1, and the Arizona Constitution, Article II, Section 25. We disagree.[4]

¶16 The ex post facto doctrine prohibits a state from "retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719 (1990). In *Dobbert v. Florida*, the Supreme Court held that ex post facto prohibitions reach only those legislative enactments

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[4] In *State v. Noble*, we held that we will interpret the state Ex Post Facto Clause in accord with federal precedent. 171 Ariz. 171, 173, 829 P.2d 1217, 1219 (1992). We find no reason to deviate from *Noble*.

that affect substantive criminal law. 432 U.S. 282, 292, 97 S. Ct. 2290, 2298 (1977). Likewise, we recently held that, under the United States and Arizona Constitutions, "[a]n *ex post facto* law is one that increases the punishment or aggravates any crime previously committed." *Zuther v. State*, 199 Ariz. 104, 111 ¶ 26, 14 P.3d 295, 302 (2000) (holding legislative amendment changing statutory computation of prisoner "gate money" not an ex post facto law because legislative purpose was not punitive).

¶17 In *Dobbert*, the Supreme Court restated the categories of laws constituting substantive changes to criminal law:

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

432 U.S. at 292, 97 S. Ct. at 2298 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 68 (1925)). Thus, a legislative act affecting changes in criminal procedure, including procedural changes that disadvantage a defendant, generally does not violate the Ex Post Facto Clause. *Collins*, 497 U.S. at 45, 110 S. Ct. at 2720 ("[Procedural] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes."); *State v. Mendoza*, 170 Ariz. 184, 193, 823 P.2d 51, 60 (1992) ("A defendant has no vested right in any particular mode of procedure.").

¶18 The question before us, then, is whether Arizona's new sentencing statutes worked a substantive or procedural change in the law as it existed when these murders took place. We regard three decisions as particularly instructive.

¶19 In *Dobbert*, the defendant argued that his death sentence violated the Ex Post Facto Clause. Dobbert killed his children in 1972. At that

time, Florida mandated a death sentence for capital felony convictions unless the jury, in its discretion, recommended mercy to the judge. *Dobbert*, 432 U.S. at 287, 97 S. Ct. at 2295. Shortly after Dobbert murdered his children, the Supreme Court decided *Furman v. Georgia*, striking down the Georgia death sentencing statute as unconstitutional.
Id. at 288, 97 S. Ct. at 2296. A month later, in *Donaldson v. Sack*, the Florida Supreme Court held the Florida death sentencing statute unconstitutional under *Furman*. 265 So. 2d 499, 501 (Fla. 1972). Later that year, the Florida Legislature amended the state's capital sentencing procedure to comply with *Furman* and *Donaldson*. *Dobbert*, 432 U.S. at 288, 97 S. Ct. at 2296. Dobbert was then tried and sentenced to death under the state's new law. *Id.* at 284, 97 S. Ct. at 2294.

¶20 Dobbert failed to persuade the Supreme Court that sentencing him under the amended procedures violated the Ex Post Facto Clause. The Court first limited ex post facto violations to those occurring when a statute makes criminal a previously innocent act, aggravates a crime previously committed, provides greater punishment, or changes the quantum of proof needed to convict a defendant. *Id.* at 292, 97 S. Ct. at 2298 (quoting *Beazell*, 269 U.S. at 169-70, 46 S. Ct. at 68). None of those categories applied to the Florida statute. Instead, the Court concluded, the statutory change between the two sentencing methods was "clearly procedural," and "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293-94, 97 S. Ct. at 2298.

¶21 The Supreme Court also rejected an Ex Post Facto Clause challenge in *Collins v. Youngblood*, a non-death penalty case. The jury had imposed a prison sentence and a fine, the latter not authorized by law. 497 U.S. at 39, 110 S. Ct. at 2717. The Texas Court of Criminal Appeals reformed the sentence under a statute enacted after the defendant's criminal act took place. *Id.* at 40, 110 S.

Ct. at 2718. The Supreme Court held that applying the sentence reform statute in the defendant's case did not violate the Ex Post Facto Clause because although the Sixth Amendment right to a jury trial is substantial, "it is not a right that has anything to do with the definition of crimes, defenses, or punishments." *Id.* at 51-52, 110 S. Ct. at 2724 (overruling *Thompson v. Utah*, 170 U.S. 343, 18 S. Ct. 620 (1898)).

¶22 In *State v. Correll*, in contrast, we found a violation of the Ex Post Facto Clause. 148 Ariz. 468, 482, 715 P.2d 721, 735 (1986), *rev'd in part on other grounds by Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998). A jury convicted the defendant of three counts of first degree murder. After the murders, but before sentencing, the legislature amended A.R.S. section 13-703.F to add multiple homicide convictions as an aggravating circumstance. We held that retroactively applying the new aggravating circumstance constituted a substantive change to capital murder and disadvantaged the defendant. *Id.* This change affected the substantive nature of the crime and sentencing by adding a new element that, if present, permitted the defendant to receive a more severe punishment than that available at the time of the crime.[5]

¶23 These cases clearly indicate not only that ex post facto principles generally do not bar applying procedural changes to criminal proceedings, but also that the general framework of a state's statutory capital sentencing scheme is procedural in nature. As *Collins* established, rights secured by the Sixth Amendment jury trial right, the right at issue here, are inherently procedural. 497 U.S. at 51, 110 S. Ct. at 2724. Under the holding of *Dobbert*, Arizona's change in the statutory method for imposing capital punishment is clearly procedural: The new sentencing statutes alter the method used to determine whether the death penalty will be imposed but make no

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[5] The Supreme Court's holding that aggravating factors serve as the functional equivalent of elements of the first degree murder offense makes this conclusion even more evident. *Ring II*, 536 U.S. at___, 122 S. Ct. at 2443.

change to the punishment attached to first degree murder. The new sentencing statutes added no new element, or functional equivalent of an element, to first degree murder.[6] *Correll*, 148 Ariz. at 481-82, 715 P.2d at 734-35. Hence, the changes to the state's capital sentencing procedures do not resemble the type of after-the-fact legislative evil contemplated by contemporary understandings of the ex post facto doctrine.

¶24 Even a procedural change amounts to an ex post facto violation, however, when it affects "matters of substance, by depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime, or arbitrarily infringing upon substantial personal rights." *Collins*, 497 U.S. at 45, 110 S. Ct. at 2720 (quoting *Beazell*, 269 U.S. at 171, 46 S. Ct. at 69; *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S. Ct. 507, 508 (1915); and *Duncan v. Missouri*, 152 U.S. 377, 382-83, 14 S. Ct. 570, 572 (1894)) (internal quotation marks omitted). The change involved here does not affect the substantive matters of the defendants' prosecutions. *See id.* Under the new sentencing statutes, to obtain a death sentence, the state must prove the same aggravating circumstances required by the former statute and must prove them beyond a reasonable doubt. The only difference is that a jury, rather than a judge, decides whether the state has proved its case. The new sentencing statutes do not place the defendants in jeopardy of any greater punishment than that already imposed under the superseded statutes. Accordingly, applying the new sentencing statutes does not violate the federal or state Ex Post Facto Clause.

IV.

Does the Double Jeopardy Clause Prohibit Resentencing Under Arizona's Amended Capital Sentencing Procedure?

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[6] S.B. 1001 made only technical and conforming changes to the aggravating circumstance list. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

¶25 The defendants argue that the double jeopardy provisions of the United States and Arizona Constitutions[7] preclude resentencing under the new sentencing statutes. We hold that they do not.

¶26 Double jeopardy prevents the government from prosecuting an individual more than once for the same offense. *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221, 223 (1957). According to the Supreme Court:

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88, 78 S. Ct. at 223; *see also Sattazahn v. Pennsylvania*, ___ U.S. ___, ___; 123 S. Ct. 732, 745-46 (2003) (reaffirming principle that the underlying purpose of the Double Jeopardy Clause is to prohibit repeated attempts by the state to convict, thereby exposing a defendant to embarrassment, expense, and the ordeal of another proceeding).

¶27 Double jeopardy principles generally do not apply to sentencing proceedings. *United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S. Ct. 426, 435 (1980). Capital sentencing proceedings, however, provide an exception to the general rule. The penalty phase of a capital trial resembles an ordinary trial proceeding in which the sentencing authority chooses "between two alternatives together with standards to guide [its] decision, [and] the prosecution undert[akes] the burden of establishing facts beyond a reasonable doubt." *Monge*

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[7] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

"No person shall . . . be twice put in jeopardy for the same offense." Ariz. Const. art. II, § 10.

v. California, 524 U.S. 721, 730, 118 S. Ct. 2246, 2251 (1998) (discussing *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852 (1981)); *see Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 2310 (1984) (holding double jeopardy applies to the penalty phase of capital trial because the penalty phase "proceeding is like a trial"). Therefore, we must determine whether resentencing the defendants under Arizona's new
sentencing statutes violates the prohibition against double jeopardy.

A.

Resentencing Does Not Increase Sentences.

¶28 The defendants argue that because Arizona's former law prescribing judge sentencing was unconstitutional, the most severe penalty they could have received for first degree murder at the original sentencing was life or natural life in prison. They assert that, under superseded section 13-703, a convicted murderer could not receive the death penalty because that punishment conceptually did not exist. Therefore, they argue, a resentencing proceeding under the new sentencing statutes would expose them to a more severe penalty than was originally available and thus constitutes double jeopardy. The defendants rely upon decisions from two state intermediate appellate courts, *California v. Harvey*, 142 Cal. Rptr. 887 (App. 1978), and *State v. Choate*, 151 Ariz. 57, 725 P.2d 764 (App. 1986).

¶29 In *Harvey*, a jury convicted Harvey of several counts, including first degree murder of a police officer. 142 Cal. Rptr. at 888. After Harvey's sentencing, the California Supreme Court declared the state's capital sentencing statute unconstitutional because it failed to bring mitigating evidence into the sentencing calculus. *Id.* at 890-91; *see Rockwell v. Superior Court*, 556 P.2d 1101, 1116 (Cal. 1976). While Harvey's appeal was pending, the California Legislature amended the
state's capital sentencing scheme. *Harvey*, 142 Cal. Rptr. at 890-91. The state argued that Harvey should be resentenced under the new

statute. *Id.* The appellate court disagreed, holding that resentencing would violate double jeopardy because, when the state supreme court held the former capital sentencing scheme unconstitutional, "that declaration automatically reduced appellant's sentence to life imprisonment." *Id.* at 891.

¶30 Similarly, in *Choate*, the Arizona Court of Appeals held that double jeopardy prevented resentencing of a defendant on a dangerous-nature sentencing issue. 151 Ariz. at 58, 725 P.2d at 765. A jury convicted Choate of second degree murder and aggravated assault. *Id.* at 57, 725 P.2d at 764. The court of appeals vacated the dangerous-nature sentence for the second degree murder conviction because that issue was not determined by a jury. *Id.* On remand, the trial judge ordered a new jury to convene to determine whether Choate should receive the dangerous-nature sentence. *Id.* Choate appealed that order.

The court of appeals concluded that, because the trial judge mistakenly dismissed the jury without submitting the dangerous nature charge in the first case, permitting a new jury to consider the enhancement allegation would constitute double jeopardy. *Id.* at 58, 725 P.2d at 765.

¶31 The Supreme Court addressed this very issue in *Dobbert*, however, and reached a different conclusion. Dobbert made the same argument that the defendants make here. The Florida Supreme Court declared the death penalty statute in effect at the time of his murders unconstitutional. Therefore, Dobbert argued, he could not receive a death sentence because "at the time he murdered his children there was no death penalty 'in effect' in Florida." 432 U.S. at 297, 97 S. Ct. at 2300. The Supreme Court rejected this argument, holding that double

jeopardy did not attach because a statute, albeit unconstitutional, permitting capital punishment for first degree murder existed at the time of the crimes. *Id.* at 298, 97 S. Ct. at 2300. That statute placed the defendant on notice that he faced capital punishment if he were convicted. *Id.*

¶32 The *Harvey* court distinguished *Dobbert* by noting that Dobbert was ultimately sentenced under a constitutional statute, whereas Harvey was not. 142 Cal. Rptr. at 890. We do not find the distinction persuasive, however, because it does not affect the Supreme Court's *Dobbert* analysis. There the Court discounted the defendant's "sophistic argument" because the more important consideration was that the state's first degree murder sentencing policy provided a death sentence even though the *procedures* for imposing that sentence later were found
unconstitutional. *Dobbert*, 432 U.S. at 297-98, 97 S. Ct. at 2300 (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 318 (1940)); *see also Knapp v. Cardwell*, 667 F.2d 1253, 1264 & n.9 (9th Cir. 1982) (rejecting argument that death sentence is automatically reduced "to life imprisonment immediately upon invalidation of the state's death penalty law"). In short, the Court rejected the defendants' argument in *Dobbert*.

¶33 The basic issue we must resolve is not whether a death sentence metaphysically existed when the defendants were sentenced, but rather whether any defendant was "acquitted" at his original trial of whatever findings were necessary to impose a death sentence. While a defendant can be resentenced following an appellate reversal of his or her original sentence, the Double Jeopardy Clause prohibits imposing any sentence of which the defendant was either actually or impliedly "acquitted" in the first instance. *Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310; *Bullington*, 451 U.S. at 437, 445, 101 S. Ct. at 1857, 1861; *Peak v. Acuna*, 203 Ariz. 83, ___ ¶ 8, 50 P.3d 833, 835 (2002) (stating implied acquittal exists where appellate court reverses conviction for insufficiency of evidence and double jeopardy precludes retrial). Thus, a defendant cannot be sentenced to death at a subsequent sentencing proceeding if "the sentencer or reviewing court has decided that the prosecution has not proved its case *that the death penalty is appropriate*." *Poland v. Arizona*, 476 U.S. 147, 155, 106 S. Ct. 1749, 1755 (1986) (internal quotation marks omitted).

¶34 The Supreme Court has thoroughly treated and established the legal principle that applies here. In *State v. Rumsey*, a jury convicted the defendant of first degree murder. 130 Ariz. 427, 636 P.2d 1209 (1981). During the sentencing phase of the trial, the judge, misinterpreting the pecuniary gain aggravating circumstance as applying only to a murder for hire, found no aggravating circumstances and sentenced the defendant to life in prison. *Id.* at 431-32, 636 P.2d at 1213-14. On appeal, we held that the pecuniary gain aggravating circumstance included any murder committed for financial gain and remanded the matter for resentencing. *Id.* at 431, 636 P.2d at 1213. On remand, the judge determined that the pecuniary gain circumstance existed and sentenced the defendant to death. *State v. Rumsey*, 136 Ariz. 166, 168, 665 P.2d 48, 50 (1983). We reviewed the case on direct appeal and held that Rumsey's death sentence violated the Double Jeopardy Clause because the life sentence imposed at his first trial implicitly acquitted him of the death sentence, and that Rumsey was "entitled to finality" on that issue. *Id.* at 175, 665 P.2d at 57.

¶35 The Supreme Court granted *certiorari* and affirmed. It held that a capital defendant cannot receive the death penalty on resentencing if he originally had been sentenced to life in prison. *Rumsey*, 467 U.S. at 212, 104 S. Ct. at 2310. The Court explained that "an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.* at 211, 104 S. Ct. at 2310. Thus, the Supreme Court's *Rumsey* decision speaks to situations in which the defendant originally received a sentence *other than* death.

¶36 In a similar case in which the defendant originally received a capital sentence, however, the Supreme Court ruled differently. In *Poland v. Arizona*, the Court held that capital defendants sentenced to death at their original sentencing proceeding and whose sentences were vacated on appeal can be resentenced to death on remand. 476 U.S. at 151, 106 S. Ct. at 1753. Both of the Poland brothers received death sentences following their first degree murder convictions. *State v. Poland*, 132 Ariz. 269, 273, 645 P.2d 784, 788 (1982). During the

sentencing phase, the judge failed to find the pecuniary gain aggravating circumstance because, like the trial judge in *Rumsey*, he misunderstood that circumstance as applying only to a murder for hire. *Id.* at 285-86, 645 P.2d at 800-01. The judge did, however, find the "especially heinous, cruel or depraved" statutory aggravating factor and sentenced the defendants to death. *Id.* at 285, 645 P.2d at 800. On appeal, this court held that the evidence adduced during the sentencing
proceeding did not support a finding of a heinous, cruel or depraved murder. *Id.* at 285, 645 P.2d at 800. We also restated that a killing need not be a murder for hire to qualify for the pecuniary gain aggravator. *Id.* at 286, 645 P.2d at 801. On remand, the judge again sentenced both Polands to death. *State v. Poland (Patrick)*, 144 Ariz. 388, 392, 698 P.2d 183, 187 (1985); *State v. Poland (Michael)*, 144 Ariz. 412, 414, 698 P.2d 207, 209 (1985). We again reviewed and affirmed the Polands' sentences on direct appeal and held that the evidence, although insufficient to support a finding of cruelty, did support a finding of pecuniary gain motive. *Poland (Patrick)*, 144 Ariz. at 407, 698 P.2d at 202; *Poland (Michael)*, 144 Ariz. at 416, 698 P.2d at 211.

¶37 On *certiorari*, the Supreme Court distinguished the Polands' case from *Rumsey*, and that distinction was critical. In *Poland*, both defendants *originally received* capital sentences. Unlike the judge in Rumsey's trial, no fact-finder had "acquitted" the Polands of capital murder by imposing a prison sentence at the first sentencing proceeding. *Poland*, 476 U.S. at 156-57, 106 S. Ct. at 1756. On resentencing, then, the defendants did not face sentencing on a charge of which they had been previously "acquitted" for double jeopardy purposes. *Id.* at 157, 106 S. Ct. at 1756. Therefore, jeopardy did not attach and double jeopardy did not bar the subsequent death sentences. *Id.*

¶38 Like the defendants in *Poland*, the defendants on direct appeal all received death sentences at their original trials. The fact-finder made those findings necessary to impose a death sentence. In no sense

has a fact-finder concluded that the state failed to prove aggravating circumstances beyond a reasonable doubt. On remand, no defendant can receive a sentence greater than that which already has been imposed. Accordingly, we hold that jeopardy has not attached.

B.

Resentencing Does Not Supplement the Original Jury Verdict.

¶39 The defendants also argue that resentencing violates double jeopardy because further jury proceedings supplement the original jury verdict, thereby violating each defendant's constitutional "right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 837 (1949). Although completing a defendant's trial with the same judge or jurors is ideal, a defendant holds no absolute right to such an arrangement. In fact, in *Wade v. Hunter*, the Supreme Court affirmed a military conviction in which the charges were dropped from one court-martial proceeding and re-instituted in another to accommodate witnesses. *Id.* at 687-88, 69 S. Ct. at 836. According to the Supreme Court:

> The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.

Id. at 688-89, 69 S. Ct. at 837.

¶40 The ability to resentence a capital defendant by a different set of jurors is implicit in double jeopardy cases decided by the Supreme Court in a death penalty context. *See Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310; *Wade*, 336 U.S. at 688-89, 69 S. Ct. at 837.[8] A capital defendant whose original sentence is vacated on appeal can be resentenced to death so long as the defendant has not been "acquitted" of the death sentence. *E.g.*, *Sattazahn*, ___ U.S. at ___, 123 S. Ct. at 738; *Poland*, 476 U.S. at 151, 106 S. Ct. at 1753.

C.

The Arizona Constitution.

¶41 We reach the same result under Article II, Section 10 of the Arizona Constitution. In *Pool v. Superior Court*, we interpreted the state Double Jeopardy Clause more broadly than its federal counterpart when prosecutorial misconduct causes a mistrial. 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984); *accord State v. Minnitt*, 203 Ariz. 431, ___ ¶ 29, 55 P.3d 774, 781 (2002). While we recognized the importance of consistency between federal and state constitutional law, we found it necessary to diverge from the double jeopardy standards established by the United States Supreme Court under the federal constitution. Our decision turned on the principle that the purpose of the Arizona Double Jeopardy Clause includes protecting citizens from facing multiple trials for the same offense because of prosecutorial bad faith:

> In our view, therefore, the resolution of the question of when jeopardy attaches should turn upon the concept of enforcing the constitutional guarantee against double jeopardy when the right to be free from multiple trials, which that clause was meant to guarantee, would be impaired by the prosecutor's

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[8] For the most part, recalling the defendant's original guilt phase jury also presents logistical problems and is wholly impractical.

> intentional, improper conduct. We do not agree that standards cannot be formulated to accomplish the objectives of the clause in situations such as this.

Pool, 139 Ariz. at 108, 677 P.2d at 271 (citation omitted).

¶42 The defendants do not face further jeopardy because of prosecutorial misconduct. Moreover, we find no reason to extend the state Double Jeopardy Clause beyond its federal counterpart under these facts. Therefore, we conclude that applying the new sentencing statutes does not constitute a double jeopardy violation under the Arizona Constitution.

V.

Should Defendants Convicted of Murders Committed Before the Natural Life Sentence Became Available Have Their Sentences Reduced to Life if the Court Reduces Their Sentences?

¶43 In 1993, the Arizona Legislature amended A.R.S. section 13-703 to add a "natural life" sentencing option for defendants convicted of first degree murder. 1993 Ariz. Sess. Laws ch. 153, § 1. The parties stipulate, and we agree, that the sentence of life without the possibility of parole for twenty-five years, rather than natural life, must apply to those defendants sentenced under the pre-1993 statute. *See, e.g., State v. Barreras*, 181 Ariz. 516, 523-24 n.7, 892 P.2d 852, 859- 60 n.7 (1995) ("The amended statute [permitting natural life sentence] is inapplicable here, however, because this case arose before its effective date."). If subsequent proceedings result in life sentences, these defendants cannot receive a natural life sentence; only a sentence of life without the possibility of parole for twenty-five years can apply.

VI.

Should the Court Review Sixth Amendment *Ring II* Error as Structural Error or for Harmless Error?

¶44 The Supreme Court struck down Arizona's former capital sentencing statutes because they permitted a judge, rather than a jury, to find aggravating factors. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. We conclude that Arizona's failure to submit this element of capital murder to the jury does not constitute structural error. Consequently, the Sixth Amendment does not require automatic reversal of a death sentence imposed under the former sentencing statutes. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833 (1999); *Arizona v. Fulminante*, 499 U.S. 279, 306-07, 111 S. Ct. 1246, 1263 (1991). Instead, we will review the defendants' capital sentences for harmless error.

¶45 Most errors that we consider on appeal, even those involving constitutional error, constitute trial errors, "which occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Fulminante*, 499 U.S. at 307-08, 111 S. Ct. at 1264. In cases involving trial error, we consider whether the error, so assessed, was harmless beyond a reasonable doubt. If so, we uphold the verdict entered. In a limited number of cases, however, structural error occurs. In such instances, we automatically reverse the guilty verdict entered. Unlike trial errors, structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 3106 (1986)).

¶46 The Supreme Court has defined relatively few instances in which we should regard error as structural. Those instances involve errors such as a biased trial judge,[9] complete denial of criminal defense

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[9] *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

counsel,[10] denial of access to criminal defense counsel during an overnight trial recess,[11] denial of selfrepresentation in criminal cases,[12] defective reasonable doubt jury instructions,[13] exclusion of jurors of the defendant's race from grand jury selection,[14] excusing a juror because of his views on capital punishment,[15] and denial of a public criminal trial.[16] In all those instances, the error infected "the entire trial process" from beginning to end. *Neder,* 527 U.S. at 8, 119 S. Ct. at 1833 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 1717 (1993)).

¶47 The Court's *Ring II* decision turned upon the fact that aggravating circumstances serve as the functional equivalent of an element of the greater capital murder offense, rather than as a sentencing factor. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. "Because Arizona's enumerated aggravating factors operate as the *functional equivalent of an element of a greater offense*," the Supreme Court held, "the Sixth Amendment requires that they be found by a jury." *Id.* (emphasis added) (citation and internal quotations omitted). The essential question, therefore, is whether we should characterize Arizona's failure to submit this element of the capital murder offense

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[10] *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963).

[11] *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330 (1976).

[12] *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944(1984).

[13] *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993).

[14] *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617 (1986).

[15] *Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045 (1987).

[16] *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984).

to the jury as structural or trial error.[17]

¶48 In a decision foreshadowing *Apprendi* and *Ring II*, the Supreme Court declined to find structural error when the trial judge failed to submit an element of the offense to the jury. In *Neder v. United States*, the Court held that the trial court's failure to instruct the jury on the materiality element of federal tax fraud should be reviewed as trial error. 527 U.S. at 19-20, 119 S. Ct. at 1839. The Court distinguished an error omitting an element of the offense in a jury instruction from structural error: "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9, 119 S. Ct. at 1833. Thus, the Court concluded, omitting an element of the offense from the jury instruction is not the sort of error that taints the trial process itself.

> Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense against the tax charges. Of course, the court erroneously failed to charge the jury on the element of materiality, but that error did not render Neder's trial "fundamentally unfair," as that term is used in our cases.

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[17] At various times, the Court's opinion suggests that *Ring II* error should be considered under a harmless error analysis. First, the Court declined to review the case for harmless error, stating instead that state courts should be the first to do so. *Ring II*, 536 U.S. at ___ n.7, 122 S. Ct. at 2443 n.7. Second, when commenting upon the fate of death row inmates after the *Ring II* decision, Justice O'Connor stated that

"prisoners will be unable to satisfy the standards of harmless error or plain error review." *Id.* at ___, 122 S. Ct. at 2449 (O'Connor, J., dissenting). Because the Court did not consider the issue of the appropriate standard of review, we do not regard these statements as conclusive.

Id. at 9, 119 S. Ct. at 1834.[18]

¶49 In a similar decision that followed *Apprendi* and *Ring II,* the Court again applied the plain error test to a judge's consideration of a factor properly left to the jury. *United States v. Cotton*, 535 U.S. 625, ___, 122 S. Ct. 1781, 1785 (2002). Federal law makes available enhanced penalties for drug offenses if the government proves a statutory threshold drug quantity. *Id.* at ___, 122 S. Ct. at 1783. In *Cotton*, the government failed to allege in its superseding indictment the quantity of drugs involved in the offense, as required by the enhanced penalty. *Id.* Based on trial testimony, the district court found the petitioner "responsible for at least 500 grams of cocaine base," ten times the amount set by statute for an enhanced penalty, and imposed the enhanced sentence. *Id.* at ___, 122 S. Ct. at 1784. The Supreme Court concluded that the district court improperly usurped the quantity finding from the grand jury, but reviewed for plain error. *Id.* at ___, 122 S. Ct. at 1785-86. The Court held that the trial evidence was so "overwhelming" and "essentially uncontroverted" that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at ___, 122 S. Ct. at 1786.

¶50 Although *Neder* and *Cotton* did not involve a capital sentence, their holdings that a failure to submit one element of an offense to a jury does not infect the trial process from beginning to end apply equally here. Under both Arizona's superseded and current capital sentencing schemes, a defendant's trial consists of two phases: a guilt phase and a penalty phase. In the guilt phase, the jury decides whether the defendant committed first degree or felony murder as defined by A.R.S. section 13-1105. If the jury finds the defendant guilty beyond a reasonable doubt, the trial continues to the penalty phase. Under the former system, the judge found, beyond a reasonable doubt, the

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[18] *See also California v. Roy*, 519 U.S. 2, 5-6, 117 S. Ct. 337, 339 (1996) (holding trial judge's failure to instruct jury on an element of accomplice liability first degree murder was a trial error to which the harmless error test applied).

ultimate element required to complete a capital murder offense: at least one aggravating circumstance not outweighed by one or more mitigating factors. A.R.S. § 13- 703.E. Defendants' trials thus took place before an impartial judge and jury, who used the correct standard of proof. Defendants received the assistance of counsel, who were available during all phases of their prosecution. Any error, then, affected the submission of one element rather than the entire trial and did not render the entire trial fundamentally unfair.[19] *See Neder*, 527 U.S. at 9, 119 S. Ct. at 1833.

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[19] The dissent disagrees with this conclusion, arguing that the defendants experienced a "[c]omplete denial of [the right to] trial by jury at the sentencing phase . . . ." Dissent, ¶ 109. Notably, the dissent does not suggest that the defendants were denied a trial by jury, and it could not, for the error here resulted not from denying defendants a jury trial but from the failure to submit one element of the capital offense to the jury for decision. A capital trial comprises just one trial, divided into guilt and sentencing phases, and has always been understood as such, both by this court and by the U.S. Supreme Court. *See, e.g., Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 2634 (1994) (holding trier of fact must find one aggravating circumstance at either the guilt or penalty phase); *Payne v. Tennessee*, 501 U.S. 808, 817, 823, 825-26, 111 S. Ct. 2597, 2604, 2607-08 (1991) (repeated references to "guilt phase" and "penalty phase" of capital trial); *State v. Smith*, 203 Ariz. 75, *passim*, 50 P.3d 825, *passim* (2002) (referring to "sentencing phase" and "sentencing hearing"); *Ring I*, 200 Ariz. at 279 ¶ 42, 25 P.3d at 1151 (referring to a "separate evidentiary hearing"). The only courts of which we are aware that have considered the argument that a capital trial consists of two "trials" rather than two phases of one trial have rejected the dissent's approach. *Flamer v. Delaware*, 68 F.3d 736, 758-59 (3rd Cir. 1995) ("The guilt and penalty phases of a capital trial are parts of a single proceeding, and there is no constitutional requirement that they be treated as if they were two entirely separate trials."); *Holland v. Mississippi*, 705 So. 2d 307, 330 ¶ 61 (Miss. 1997) (sentencing phase of a capital trial not a separate trial, but that phase of the case that concerns sentencing).

Arizona statutes reflect the single capital trial approach accepted by our court and the Supreme Court. Arizona law refers to the sentencing proceeding as the capital trial's "penalty phase." *E.g.*, A.R.S. § 13-703.C. In addition, former and current capital sentencing statutes permit use at the sentencing phase of evidence adduced during the guilt phase of the trial. *Id.* §§ 13-703.C (2001), 13-703.D (Supp. 2002).

¶51 We are not the first court to reach this conclusion. Courts implementing *Apprendi* and *Ring* have reached a consensus that structural error does not occur when a judge fails to submit to the jury an element of a crime, otherwise required to be found by a jury under the Sixth Amendment.[20] In *United States v. Matthews*, the court held "*Apprendi* error is susceptible to harmless error analysis." 312 F.3d 652, 665 (5th Cir. 2002). The Seventh Circuit Court of Appeals also found "that errors in both the indictment and the charge to the jury are subject to harmless-error analysis." *United States v. Dumes*, 313 F.3d 372, 385 (7th Cir. 2002); *accord United States v. Sanders*, 247 F.3d 139, 150 (4th Cir. 2001) (citing cases from the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits holding that harmless error applies in *Apprendi* cases); *Johnson v. Nevada*, P.3d 450, 459-60 (Nev. 2002).[21]

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[20] The one case finding structural error is *Esparza v. Mitchell*, a case involving a challenge under the Eighth Amendment rather than the Sixth. In that case, two members of the panel held the harmless error test inapplicable in a capital case where, under Ohio law, aggravating factors were required to be charged in the indictment but were not. 310 F.3d 414, 421 (6th Cir. 2002). The dissenting judge, concluding that harmless error applied, outlined the seminal Supreme Court cases defining the harmless error doctrine and concluded that the error involved did not amount to deprivation of "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id.* at 428 (Suhrheinrich, J., dissenting) (quoting *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833 (internal quotation marks omitted)).

[21] In addition to these decisions involving the Sixth Amendment, federal courts have held that Eighth Amendment violations occurring at the trial court level are subject to harmless error analysis. *See, e.g., Jones (Lewis) v. United States*, 527 U.S. 373, 402-05, 119 S. Ct. 2090, 2108-10 (1999); *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441 (1990). Most recently, the Ninth Circuit Court of Appeals held that a death sentence imposed when an unconstitutionally vague jury instruction was given could be reviewed for harmless error. *Valerio v. Crawford*, 306 F.3d 742, 756 (9th Cir. 2002) ("When a state trial court sentences a defendant to death based in part
on an unconstitutionally vague aggravating circumstance, the state appellate court . . . can find the error harmless under *Chapman v. California*." (Citation omitted.)).

¶52 Those holdings comport with prior Arizona law. In *State v. Styers*, we applied the fundamental error test to the trial judge's failure to define the "without legal authority" element of the kidnapping offense in instructions to the jury. 177 Ariz. 104, 111-12, 865 P.2d 765, 772-73 (1993).

¶53 Accordingly, we hold that Arizona's failure to require a trial judge to submit the aggravating circumstance element of capital murder to a jury does not constitute structural error. We will review the sentences of these defendants for harmless error.

VII.

A.

Does *Ring II* Apply to Aggravating Circumstances Involving Prior Convictions?

¶54 Arizona law establishes two aggravating circumstances for prior criminal convictions.[22] A.R.S. § 13-703.F.1-.2. The first of Arizona's prior conviction factors, A.R.S. section 13- 703.F.1, applies when "[t]he defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." The second, A.R.S. section 13-703.F.2, is implicated when "[t]he defendant was previously convicted of a

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[22] The 2002 amendment did not change the F.1 and F.2 aggravating factors. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

serious offense, whether preparatory or completed."[23] In *Almendarez-Torres v. United States*, the Supreme Court held that a judge could consider prior
convictions to enhance a penalty beyond that authorized by the facts established by the jury's verdict. 523 U.S. 224, 226-27, 118 S. Ct. 1219, 1222 (1998).

¶55 The State argues that *Almendarez-Torres* establishes an exception to *Apprendi/Ring* for the two prior conviction aggravating circumstances. According to the State, a judge may constitutionally determine the existence of any prior conviction. The defendants argue

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[23] Section 13-703.H defines "serious offense" as:

1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.

A.R.S. § 13-703.H (Supp. 2002).

Before 1993, this aggravating circumstance occurred if "[t]he defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." A.R.S. § 13-703.F.2 (1989), *amended by* 1993 Ariz. Sess. Laws ch. 153, § 1.

that *Almendarez-Torres* is no longer good law.[24] They also argue that the F.1 and F.2 aggravating circumstances do not fit within the prior conviction exception. Alternatively, they argue that the Arizona Constitution's jury trial guarantee should supplant *Almendarez-Torres* and require a jury determination of prior convictions. For the following reasons, we hold that *Almendarez-Torres* remains effective and that the Sixth Amendment does not require a jury to determine prior convictions under sections 13-703.F.1 and F.2.

1. Prior Conviction Aggravating Circumstance.

¶56 First we consider whether Arizona's statutory aggravating circumstance for prior convictions falls within the *Almendarez-Torres* exception. In cases handed down within the past five years, the Supreme Court consistently has stated that a statutory provision permitting increased penalties when a defendant has a prior conviction operates as a sentencing enhancement and not as an element of a criminal offense.[25]

¶57 In two Supreme Court cases, defendants challenged sentencing

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[24] The defendants argue that we should ignore *Almendarez-Torres* because Justice Thomas allegedly has repudiated his position in that case, thereby "expressly" invalidating the decision. In *Apprendi v. New Jersey*, Justice Thomas did express regret for voting with the five member *Almendarez-Torres* majority. 530 U.S. 466, 518-21, 120 S. Ct. 2348, 2378-79 (2000).

The defendants' supposition as to Justice Thomas's view, however, does not comport with the Supreme Court's recent decision in *Sattazahn v. Pennsylvania*, U.S. __, 123 S. Ct. 732 (2003). In that case, Justice Thomas joined Justice Scalia's separate opinion which stated, in *dicta*, that "the existence of any fact *(other than a prior conviction)* increas[ing] the maximum punishment that may be imposed . . . constitutes an element [of the offense]." *Id.* at ___, 123 S. Ct. at 739 (emphasis added). This language demonstrates the dangers of vote-counting before the Court announces its decision on a particular issue.

[25] The Court continuously refers to the prior conviction enhancement as an exception to *Apprendi*. *E.g.*, *Sattazahn*, ___ U.S. at ___, 123 S. Ct. at 739; *United States v. Cotton*, 535 U.S. 625, ___, 122 S. Ct. 1781, 1783 (2002).

enhancements when the government failed to allege the factor increasing their penalty in the indictment. In *Almendarez-Torres*, the Court held that a prior conviction need not be alleged in a criminal indictment. 523 U.S. at 226-27, 118 S. Ct. at 1222. The Court first concluded that Congress intended to use recidivism as a sentencing factor and not as a substantive element. *Id.* at 230-31, 118 S. Ct. at 1226. It then noted that recidivist provisions traditionally are used exclusively as sentencing factors, pointing out that no federal criminal statute contains recidivism as a statutory element. *Id.* at 244, 118 S. Ct. at 1231. Enhanced penalties for repeat offenders do "not relate to the commission of the offense, *but go[] to the punishment only*, and therefore . . . may be subsequently decided [by a judge]." *Id.* at 244, 118 S. Ct. at 1231 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629, 32 S. Ct. 583, 588 (1912)).

¶58 In its next term, the Court decided a similar case and reached a revised, but consistent, conclusion. In *Jones v. United States*, the Court held that federal prosecutors must allege in the indictment and prove, beyond a reasonable doubt, an element of the federal car jacking statute the lower courts previously had regarded as a sentencing factor. 526 U.S. 227, 229, 119 S. Ct. 1215, 1217 (1999). In Jones's case, serious bodily injury provided the additional element. *Id.* at 231, 119 S. Ct. at 1218. Notwithstanding its decision, the Court reaffirmed that "not every fact expanding a penalty range must be stated in a felony indictment" and expressly distinguished sentence enhancements for prior criminal convictions from other statutory elements because the law traditionally regards "recidivism as a sentencing factor, not as an element to be set
out in the indictment." *Id.* at 248-49, 119 S. Ct. at 1226-27. The Court appeared less concerned with the fact that *Jones* involved a Sixth Amendment challenge, while *Almendarez-Torres* did not, than with the fact that sentencing enhancements for prior convictions serve a traditional penological purpose. *Id.*

¶59 The Court revisited the prior conviction sentence enhancement issue in *Apprendi,* decided one year after *Jones*. In *Apprendi*, the

Court held that a statutory provision providing an increased penalty when a crime was motivated by "hate" involved not a sentencing enhancer, but an element of the offense. 530 U.S. at 491-92, 120 S. Ct. at 2363. Consequently, the Sixth Amendment jury trial right required that the jury determine the element's existence before the enhanced penalty could be imposed. *Id.* at 490, 120 S. Ct. at 2362-63 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). The Court carefully distinguished its view that prior convictions are not elements of an offense and structured its holding to exclude prior convictions from its reach. *Id.* at 487-90, 120 S. Ct. at 2361-63.

¶60 The *Apprendi* Court found no need to submit the question of prior convictions to the jury because, unlike other factors, prior convictions already had been established through proceedings incorporating procedural safeguards:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum statutory range.

530 U.S. at 488, 120 S. Ct. at 2362. Thus, permitting a judge to decide the "fact" of a prior conviction does not raise Sixth Amendment concerns; those convictions are themselves products of Sixth Amendment-compliant proceedings.

¶61 We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly overrules or casts cognizable doubt on that decision. In *Agostini v. Felton*, the Court stated:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has

> direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989)); *accord United States v. Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) ("If the views of the Supreme Court's individual justices and the composition of the Court remain the same, *Almendarez-Torres* may eventually be overruled.") (citing *Apprendi*, 120 S. Ct. at 2362 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.")); *State v. Harrod*, 200 Ariz. 309, 318 ¶ 44, 26 P.3d 492, 501 (2001) (rejecting defendant's argument that *Apprendi* implicitly overruled *Walton*), *vacated on other grounds by Harrod v. Arizona*, ___ U.S. ___, 122 S. Ct. 2653 (2002) (mem.). Our constitutional system requires adherence to the rule of law established in *Almendarez-Torres* unless and until the Court unequivocally disapproves its holding. *Ring I*, 200 Ariz. at 279-80 ¶ 44, 25 P.3d at 1151-52.

2. Lower Federal and State Appellate Courts.

¶62 Courts consistently have implemented both *Apprendi* and *Almendarez-Torres*. In cases decided after *Apprendi*, many defendants facing prior conviction sentence enhancements argued that *Apprendi* had either overruled or cast doubt upon *Almendarez-Torres*. Courts universally reject this argument and recognize that the two cases can be harmonized by construing *Almendarez-Torres* as the exception to *Apprendi*'s general rule. *E.g.*, *United States v. Martino*, 294 F.3d 346, 349 (2d Cir. 2002); *United States v. Stone*, 306 F.3d 241, 243 (5th Cir.
2002); *Cherry v. Araneta*, 203 Ariz. 532, ___ ¶ 5, 57 P.3d 391, 392-93 (App. 2002); *State v. Kendall*, 58 P.3d 660, 667-68 (Kan. 2002).

In explaining its decision, the Ninth Circuit Court of Appeals stated:

> It is true that in *Apprendi,* the Court expressed reservations about *Almendarez-Torres*. However, the Court reasoned that any due process or Sixth Amendment concerns—arising out of the judicial determination of a "fact" that increased punishment beyond the statutory maximum—were mitigated in *Almendarez-Torres* by "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that [the defendant] did not challenge the accuracy of that 'fact' in his case." Thus, the Court in *Apprendi* chose not to overrule *Almendarez-Torres,* and unmistakably carved out an exception for "prior convictions" that specifically preserved the holding of *Almendarez-Torres*.

Pacheco-Zepeda, 234 F.3d at 414 (citations omitted).

¶63 The Supreme Court consistently has held that legislatures may permit a judge to impose an increased penalty based upon a defendant's recidivism. We therefore conclude that the Sixth Amendment does not require a jury to find prior convictions beyond a reasonable doubt.

3. F.1 and F.2 Prior Conviction Aggravating Factors.

¶64 Several defendants whose cases are consolidated in this appeal received death sentences based, at least in part, upon prior conviction findings made by a sentencing judge. Following the teachings of *Almendarez-Torres*, *Jones* and *Apprendi*, we hold that the Sixth Amendment does not require remanding these cases for resentencing on the F.1 and F.2 circumstances.

¶65 The characteristic of a prior conviction aggravating circumstance that sets it apart from other circumstances is that the original criminal proceeding, through either a guilty plea or a verdict of guilt, established the circumstance. No additional benefit derives from

having a jury re-find an aggravating circumstance already established through a guilty
plea or a jury verdict. At each proceeding giving rise to the prior criminal conviction, defendants either waived their right to a jury trial or received a jury determination of guilt, and procedural safeguards protected the defendant against constitutional violations. Moreover, each defendant had an opportunity to appeal his conviction.

¶66 The F.1 and F.2 aggravating circumstances contemplate a more severe punishment for persons who continue to commit crimes. Our jurisprudence traditionally has viewed recidivism as a sentencing factor to be determined by a judge. *Almendarez-Torres*, 523 U.S. at 243, 118 S. Ct. at 1230. Moreover, under the pre-*Ring II* capital sentencing scheme, the legislature clearly intended prior convictions to be sentencing factors and not substantive elements of capital murder. *See, e.g.*, A.R.S. § 13-703.F-.G (Supp. 2001) (instructing the court to consider aggravating circumstances when deciding which sentence to
impose).

¶67 We reach a different conclusion for those defendants for whom the trial judge found an F.2 aggravating circumstance prior to 1993. As to those defendants, determining the presence of the F.2 factor required additional fact finding; the judge needed to go beyond the mere fact that the prior conviction existed.

¶68 Arizona amended the requirements for finding an F.2 factor in 1993.[26] Prior to the 1993 amendment, section 13- 703.F.2 permitted finding this aggravating circumstance when "[t]he defendant was previously convicted of a felony in the United States *involving the use or threat of violence on another person*." A.R.S. § 13-703.F.2 (1989) (emphasis added). State law did not define "violence" in this context. In *United States v. Breitweiser*, the court pointed out:

> If a recidivist statute permitted enhancement based on

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[26] 1993 Ariz. Sess. Laws ch. 153, § 1.

> proof of underlying conduct, however, factual questions could arise as to exactly what conduct the defendant engaged in. Typically, such factual questions are within the province of a jury and this Court doubts that the Supreme Court would construe *Almendarez-Torres* as applying to such situations.

220 F. Supp. 2d 1374, 1379 (N.D. Ga. 2002). We agree that when an additional finding must be made beyond the bare fact that a prior conviction exists, the Sixth Amendment demands that a jury perform this task. That situation can arise for defendants whose F.2 factor depended upon a finding that a prior conviction reflected a crime involving the use or threat of violence. None of the consolidated defendants were sentenced under such a circumstance. Therefore, none of these cases involve a Sixth Amendment violation based on a judge's finding of one or more F.2 aggravating circumstances.

4. The Arizona Constitution.

¶69 This court has held that the Arizona Constitution's Sixth Amendment analog, Article II, Section 23,[27] provides substantially the same right to a jury trial as does the Sixth Amendment. *State v. Carlson*, 202 Ariz. 570, 577 ¶ 18, 48 P.3d 1180, 1187 (2002). Nevertheless, the defendants urge us to look to the Arizona Constitution to find a requirement that prior conviction aggravating circumstances must be found by a jury.

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[27] That provision states:

> The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Ariz. Const. art. II, § 23.

¶70 They point to two decisions. The first, *State v. Carlson*, rejected an argument that the Arizona constitutional right to an impartial jury provides greater protection than does the federal constitution against pretrial publicity affecting the jury pool. *Id.* at 576-77 ¶¶ 17-18, 48 P.3d at 1186-87. We stated that our constitution does not afford any greater protection to defendants against pretrial media coverage than does the federal constitution. *Id.* at 577 ¶ 18, 48 P.3d at 1187. The second case, *State ex rel. McDougall v. Strohson*, held that Arizona's Constitution traditionally provides greater access to jury trials than that required by the federal constitution. 190 Ariz. 120, 121-22, 945 P.2d 1251, 1252-53
(1997). Under the federal constitution, only crimes punishable by more than six months in jail must be tried by a jury. *Id.* at 122, 945 P.2d at 1253. In instances in which a defendant can be sentenced to less than six months in jail, in contrast, our constitution demands a jury trial if "the moral quality of the act charged, and its relationship to common law crimes" requires that a jury determine guilt.[28] *Id.*

¶71 In relying on these decisions, the defendants overlook the distinction between jury impartiality or jury access issues and the *Apprendi/Ring* issue. The *Carlson* case rejected an expansive interpretation of the Arizona Constitution because we were unwilling to move beyond federal precedent in this area. Our holding in *Strohson* means only that a defendant is entitled to a jury trial for certain minor crimes for which the federal constitution does not require a jury trial.

¶72 Under these facts, then, we hold that Article II, Section 23 provides substantially the same jury trial right as does the Sixth Amendment.

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[28] For instance, we have held that the crimes of driving under the influence, *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966), and possession of marijuana, *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989), require a jury trial even though they are punishable by less than six months in jail.

B.
Can the Finding of an Aggravating Circumstance Be Implicit in the Jury's Verdict of Conviction?

¶73 We asked the parties to discuss whether any aggravating circumstance could necessarily derive from a jury's verdict of conviction for first degree murder, either standing alone or when considered in conjunction with other contemporaneous convictions. The State argues that pecuniary gain, A.R.S. section 13-703.F.5, other homicides committed during the commission of the offense, A.R.S. section 13-703.F.8, and age of victim less than fifteen years or seventy years or older, A.R.S. section 13-703.F.9, can logically inhere in a verdict. The defendants argue that an aggravating circumstance can never be implicit.

¶74 We hold that the pecuniary gain and multiple homicide aggravators usually are not implicit in a jury's verdict. However, the age of the victim can be implicit in the verdict, if the jury simultaneously convicts the defendant of an offense that includes the age of the murdered victim as an element of the crime.[29]

1. Pecuniary Gain.

¶75 Under A.R.S. section 13-703.F.5, an aggravating circumstance exists when a murder is committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703.F.5. To establish the pecuniary gain aggravating circumstance, the state must prove that the murder would not have occurred but for the defendant's pecuniary motive. *State v. Harding*, 137 Ariz. 278, 296-97, 670 P.2d 283, 394-95 (1983).

¶76 Determining whether a defendant murdered his victim for

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[29] The 2002 amendment did not change the F.5 and F.8 aggravating circumstances. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1. It did, however, make a technical change to the F.9 factor. *Id.*

pecuniary gain requires a highly fact-intensive inquiry. The state must establish the connection between the murder and motive through direct or strong circumstantial evidence. *State v. Cañez*, 202 Ariz. 133, 159 ¶ 94, 42 P.3d 564, 590 (2002) (holding murder of victim and only witness to robbery "is powerful circumstantial evidence of an intent to facilitate
escape" and supports finding pecuniary motive); *State v. Gillies*, 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983) ("Without some tangible evidence, or strong circumstantial inference, it is not for the sentencing court to conclude that because money and items were taken, the purpose of the murder was pecuniary gain.").

¶77 Complex fact situations require careful attention and analysis before a fact-finder confidently can conclude that pecuniary ends motivated the killing. When the state concurrently prosecutes a capital defendant for first degree murder and, for instance, robbery, both crimes resulting from the same occurrence, the state does not establish the pecuniary gain factor simply by showing that the robbery occurred. Rather, the state assumes the additional burden of showing that pecuniary gain was "a motive, cause, or impetus for the murder and not merely the result of the murder." *State v. Kayer*, 194 Ariz. 423, 433 ¶ 32, 984 P.2d 31, 41 (1999); *see, e.g., State v. Lee*, 185 Ariz. 549, 558, 917 P.2d 692, 701 (1996) (affirming pecuniary gain aggravating circumstance where defendant killed to facilitate escape after robbery).

¶78 The pecuniary gain factor thus requires more than the jury's conviction of a defendant for first degree murder and robbery or burglary. The fact-finder must draw the separate conclusion that the defendant killed, at least in part, for pecuniary motive. For that reason, we cannot conclude that a jury finding of pecuniary gain inheres in its robbery or burglary verdict.

¶79 Therefore, we will apply a harmless error analysis to the pecuniary gain factor. In those instances in which no reasonable jury could find that the state failed to prove a pecuniary gain motive

beyond a reasonable doubt, we will find harmless error affecting that factor. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

2. Multiple Homicides.

¶80 A.R.S. section 13-703.F.8 permits a judge to find an aggravating circumstance if "[t]he defendant has been convicted of one or more other homicides, as defined in § 13-1101, that were committed during the commission of the offense." A.R.S. § 13-703.F.8. As with the pecuniary gain factor, this factor requires the state to establish more than that the jury convicted the defendant of first degree murder and one or more other homicides occurring around the same time. Instead, all homicides must take place during "one continuous course of criminal conduct." *State v. Rogovich*, 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997) (quoting *State v. Ramirez*, 178 Ariz. 116, 130, 871 P.2d 237, 251 (1994)). This conclusion can be drawn only after the fact-finder analyzes "the temporal, spatial, and motivational relationships between the capital homicide and the collateral [homicide], as well as . . . the nature of that [homicide] and the identity of its victim." *Id.* (quoting *State v. Lavers*, 168 Ariz. 376, 393, 814 P.2d 333, 350 (1991)).

¶81 A jury verdict convicting a defendant of two or more homicides does not in itself establish the multiple homicide aggravating circumstance. Without a finding that the murders are temporally, spatially and motivationally related, the bare jury verdict does not implicitly support the F.8 aggravator. *Id.*

¶82 e will find harmless error affecting this factor in hose cases in which no reasonable jury could find that the state failed to prove the F.8 factor beyond a reasonable doubt. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

3. Age of Victim.

¶83 Under A.R.S. section 13-703.F.9, an aggravating circumstance exists when, at the time the murder was committed, "[t]he defendant was an adult . . . or tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older." A.R.S. § 13-703.F.9. The statute is straightforward; the ages of the offender and victim invoke the aggravator. *Medina*, 193 Ariz. at 511 ¶ 23, 975 P.2d at 101 (holding this aggravating circumstance does not require further
finding that the defendant was aware of the victim's age). The F.9 finding is implicit in the jury's verdict if the jury convicts the defendant of first degree murder and another crime committed against the murder victim in which the age of the victim constitutes a substantive element of the crime.

¶84 In some instances, Arizona's criminal code defines crimes based on the young age of the victim. For example, a person commits child molestation "by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age." A.R.S. § 13-1410.A (2001).

¶85 Because the victim's age constitutes a substantive element of certain criminal offenses, a conviction necessarily reflects a jury determination that the victim was less than fifteen years old. The jury will have already found the necessary fact, age of the victim, through criminal proceedings compliant with Sixth Amendment safeguards. *Apprendi*, 530 U.S. at 488, 120 S. Ct. at 2362. Under these circumstances, the jury's implicit finding of the victim's age satisfies the F.9 aggravating circumstance.

¶86 If the trial judge found the F.9 factor and the jury also convicted the defendant of an age-dependent crime committed against the murder victim, we will find any *Ring II* error harmless. Other circumstances that may involve harmless error include, for example, those instances in which the defendant stipulated to the age of the

victim or in which overwhelming evidence establishes the victim's age. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

C.
If One Aggravating Factor Was Not Subject to *Ring II*, Was Implicitly Found by the Jury or it Was Otherwise Obvious that One Aggravator Has Been Established Beyond a Reasonable Doubt,Is There Need for Resentencing?

¶87 The State asserts that if the jury implicitly found one aggravating factor or the trial judge found one factor not subject to the *Ring II* analysis, we can uphold the capital sentence imposed by the trial judge as harmless error. The argument relies upon the fact that Arizona's superseded sentencing scheme rendered a defendant "death eligible" if one aggravating factor existed. *Ring I*, 200 Ariz. at 279 ¶ 42, 25 P.3d at 1151. Nothing in *Ring II*, the State argues, prevents a trial judge from finding the second and succeeding aggravating factors, as well as finding mitigating factors and balancing them against the aggravator.

¶88 A narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors in the circumstances described by the State. As the State contends, once the government establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view, however, *Ring II* should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single
aggravating factor, we conclude that *Ring II* requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring II*, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

¶89 Another factor leads us to conclude that we should not adopt the

State's argument. As is evident, the procedures urged by the State do not reflect any sentencing procedure ever adopted by our legislature. In both the superseded and current capital sentencing schemes, the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. §§ 13- 703.E (Supp. 2002) and 13-703.F (Supp. 2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. We will not speculate about how the State's proposal would impact this essential process. *Clemons v. Mississippi*, 494 U.S. 738, 754, 110 S. Ct. 1441, 1451 (1990) ("In some situations, a state appellate court may conclude that peculiarities in a case make appellate . . . harmless error analysis extremely speculative or impossible."); *see also Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002)(as applied to Nevada law, *Ring II* requires jury to weigh mitigating and aggravating factors under Nevada's statute requiring the fact-finder to further find whether mitigating circumstances are sufficient to outweigh the aggravating circumstances).

¶90 We therefore hold that the presence of one or more aggravating factors either exempt from *Ring II*, inherent in the jury's guilty verdict, or otherwise established beyond a reasonable doubt does not, in itself, establish that a defendant's capital sentence resulted from harmless error.

D.

Does *Ring II* Require Resentencing if a Defendant Conceded or Did Not Challenge the Aggravating Factors Found by the Trial Court?

¶91 The State contends that if a defendant stipulates to facts sufficient to establish an aggravating factor or fails to challenge one or more aggravating circumstances, that factor stands. The failure renders error harmless and essentially establishes overwhelming, undisputed proof of that factor's existence. The defendants argue that neither concession nor failure to contest waives a defendant's right to a jury trial on aggravating factors. Substantial differences exist between a defendant's decision to concede an aggravating circumstance and a defendant's decision not to contest an aggravating circumstance, and we distinguish between those situations.

¶92 In *United States v. Cotton*, the Supreme Court reviewed a case in which the defendant did not contest an element responsible for his sentence enhancement. 535 U.S. 625, 122 S. Ct. 1781 (2002). The issue was whether *Apprendi* required vacating an enhanced sentence under a federal narcotics criminal statute when the government failed to include in the indictment the amount of cocaine, a fact essential to justifying the enhanced sentence. *Id.* at ___, ___ n.3, 122 S. Ct. at 1783,
1786 n.3. After examining for plain error, the Court found no reversible error under *Apprendi* because the government presented overwhelming and essentially uncontroverted evidence of the amount of cocaine base at trial. *Id.* at ___ & n.3, 122 S. Ct. at 1786 & n.3; *see also United States v. Smith*, 282 F.3d 758, 771-72 (9th Cir. 2002) (holding *Apprendi* error harmless where defendant failed to contradict evidence establishing drug quantity or object to jury instruction stating threshold drug quantity need not be found); *Robinson v. United States*, 129 F. Supp. 2d 627, 632 (S.D.N.Y. 2001) (holding failure to submit drug quantity issue to jury did not prejudice defendant when he did not challenge the amount).

¶93 In cases in which a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, we will regard that factor as established. Our harmless error inquiry then focuses on whether no reasonable jury could find that the mitigation evidence adduced during the penalty phase is "sufficiently substantial

to call for
leniency." A.R.S. §13-703.E. Unless we conclude beyond a reasonable doubt that a jury would impose a death sentence, we must remand the case for resentencing. *See Id.* § 13-703.E; *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 1838 (1999); *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). See *infra*, Section VIII.

¶94 When a defendant simply fails to challenge an aggravating circumstance at the penalty phase, the state retains the burden of proving the aggravator's existence beyond a reasonable doubt. *See State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). Our inquiry then becomes whether the state has met its burden. If reasonable doubt exists as to this factor, then we must consider remanding for resentencing.

E.

Can the State Raise Harmless Error if It Did Not Make That Argument Below?

¶95 The defendants argue that the State waived its harmless error argument by failing to raise it prior to this stage of litigation. We disagree. Until the Supreme Court overruled *Walton v. Arizona*, the State had no reason to argue that failure to obtain jury findings as to aggravating factors constituted error at all. *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2, 113 S. Ct. 838, 842 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed."). Only after the Court defined constitutional error in Arizona's sentencing procedure did the question whether such error was harmless arise. We will not penalize the State for failing to anticipate the Court's holding in *Ring II*.

¶96 Moreover, the Arizona Constitution imposes an independent obligation on the state judiciary not to reverse a case "for technical error in pleadings or proceedings when upon the whole case it shall

appear that substantial justice has been done." Ariz. Const. art. VI, § 27 (2001); *accord* A.R.S. § 13-3987 (2001). If error is harmless, in these or other cases, substantial justice has been done.

F.

Does the Sixth Amendment Require the Jury to Make *Enmund-Tison* Findings in Capital Felony Murder Cases?

¶97 In cases of first degree felony murder convictions, an *Enmund-Tison* finding must be made to satisfy the Eighth Amendment's proportionality standard. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368 (1982). In Arizona, the trial judge makes this finding. *See State v. Greenway*, 170 Ariz. 155, 171, 823 P.2d 22, 38 (1991). The defendants argue that *Ring II* requires that *Enmund-Tison* findings be made by a jury. We hold that the Sixth Amendment principles of *Apprendi/Ring* do not require a jury to make *Enmund-Tison* findings.

¶98 The Eighth Amendment's Cruel and Unusual Punishment Clause prohibits "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."[30] *Weems v. United States*, 217 U.S. 349, 371, 30 S. Ct. 544, 551 (1910) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40, 12 S. Ct. 693, 699-700 (1892) (Field, J., dissenting)). In capital punishment terms, the Eighth Amendment requires courts to consider carefully death sentences imposed on defendants convicted of felony murder. In *Enmund v. Florida* and *Tison v. Arizona*, the Supreme Court imposed Eighth Amendment cruel and unusual punishment restraints in capital felony murder cases. The Court held that Eighth Amendment principles forbid a state from sentencing to death a defendant "who aids and

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[30] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666, 82 S. Ct. 1417, 1420 (1962).

abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797, 102 S. Ct. at 3376. Five years later, in *Tison*, the Court refined its prior decision by holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158, 107 S. Ct. at 1688.

¶99 The Supreme Court already has addressed the question whether a jury must make *Enmund-Tison* findings. In *Cabana v. Bullock*, the Court held that the federal constitution does not require a jury to determine a defendant's level of culpability in capital felony murder cases. 474 U.S. 376, 385, 106 S. Ct. 689, 696 (1986). Foreshadowing its recent Sixth Amendment decisions, the Court distinguished *Enmund* from the statutorily defined elements of a substantive offense at issue in *Apprendi*:

> [O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant—it *establishes no new elements of the crime of murder that must be found by the jury*. Rather, as the Fifth Circuit itself has recognized, *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." *Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill.

Id. (citation and footnote omitted)(emphasis added).

¶100 We conclude that this distinction withstands *Apprendi* and *Ring II*. *Enmund-Tison* findings affect sentencing very differently than do findings of aggravating circumstances. Even if a jury is satisfied that the state has established all statutory elements for capital felony

murder, including aggravating circumstances, the judge must remove the defendant from the class of defendants otherwise death-eligible if she cannot make *Enmund-Tison* findings. The question is not whether the state has met its burden but whether, given a defendant's culpable mental state, the government can impose capital punishment consistent with the Eighth Amendment's proportionality threshold. That determination involves not a Sixth Amendment jury trial right but rather an Eighth Amendment proportionality analysis, traditionally the prerogative of the judge. As the *Cabana* Court stated:

> [T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make.

Id. at 386, 106 S. Ct. at 697.

¶101 The difference between aggravating circumstances as substantive elements of a greater offense and the *Enmund-Tison* findings as a restraint on capital sentencing dictates our decision that *Apprendi/Ring* does not require these findings to be made by the jury. *Id.* The Sixth Amendment assigns to the jury responsibility for determining whether all statutory criminal elements exist. Therefore, a defendant cannot receive a particular sentence unless a jury finds all the elements of the offense charged. *Id.* at 384, 106 S. Ct. at 696 (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968)). The *Enmund-Tison* findings, on the other hand, operate as a judicially crafted instrument used to measure proportionality between a defendant's criminal culpability and the sentence imposed. These two rules of law are conceptually and constitutionally distinct. We hold that the Sixth Amendment does not require that a jury, rather than a judge, make *Enmund- Tison* findings.

VIII.

Conclusion.

¶102 Our review of aggravating circumstances will produce one of several results. In some of these consolidated cases, our review will not allow the conclusion, beyond a reasonable doubt, that the error did not contribute to or affect the capital sentence. In those cases, we must remand for resentencing.

¶103 Other cases will involve aggravators that we will regard as established. In some of those cases, the aggravating factors fall outside the *Ring II* analysis. Others will involve aggravating factors that inhere in the jury's verdict or to which a defendant stipulated. In yet other instances, the evidence presented at trial and the sentencing hearing may be sufficiently overwhelming that we will conclude no reasonable
jury would have failed to find the factor established beyond a reasonable doubt. Even in these instances, however, one further determination can affect our harmless error analysis.

¶104 Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section *and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency*.

A.R.S. § 13-703.E (emphasis added);[31] *see also Id.* § 13-703.01.H. Because a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency. If we cannot reach that conclusion, we must find reversible error and remand the case for resentencing. In separate opinions, we will consider individually the sentences of these defendants, applying the standards set forth in this opinion.

Ruth V. McGregor, Vice Chief Justice

CONCURRING:

Rebecca White Berch, Justice
Michael D. Ryan, Justice

F E L D M A N, Justice (Retired), concurring in part and dissenting in part:

¶105 I dissent from Part VI of the majority opinion because I cannot agree that the complete absence of the jury in the separate capital sentencing proceeding that determines a defendant's eligibility for the death penalty is reviewable for harmless error. In my view, the denial of a jury in the sentencing phase is a defect in the fundamental mechanism of the trial and is therefore structural error; thus the death sentence should be vacated. This is not only required by logic but is the teaching of a long line of our cases.

¶106 We have just recently held, for instance, that the erroneous exclusion for cause of prospective jurors was structural error that

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[31] The legislature's post-*Ring II* amendments to section 13-703 replaced "court" with "trier of fact," referring to the jury or, in cases of a waiver of trial by jury, the court. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

required reversal. *State v. Anderson*, 197 Ariz. 314, 324, ¶ 23, 4 P.3d 369, 379, ¶ 23 (2000). To hold otherwise and review for harmless error would lead us "down a slippery slope that could be used to justify overlooking every structural error [such as] denial of a jury trial or the right to counsel." *Id.* at 323, ¶¶ 21-22, 4 P.3d at 378, ¶¶ 21-22; *see also State v. Henley*, 141 Ariz. 465, 469, 687 P.2d 1220, 1224 (1984) (structural error to try defendant to eight-person jury when constitution guaranteed twelve-person jury for crime charged); *State v. Luque*, 171 Ariz. 198, 200, 829 P.2d 1244, 1246 (App. 1992) (trial to wrong number of jurors is fundamental, structural error).

¶107 If, as we have held, it is fundamental and structural error erroneously to exclude potential jurors or try a defendant to an insufficient number of jurors, it is difficult to see how deprivation of trial by jury at the capital sentencing phase can be less erroneous. The reason is plain: it is simply impossible to predict what a jury would have done if one had been impaneled. *State v. Smith*, 197 Ariz. 333, 339-40, 4 P.3d 388, 394-95 (App. 1999). Appellate review of such error is not "like measuring the effect of erroneous evidentiary rulings against the overall weight of properly admitted evidence. Errors involving the composition of the court or jury affect the legitimacy of the entire proceeding, leaving nothing to measure or weigh and requiring reversal." *Anderson,* 197 Ariz. at 323, ¶ 22, 4 P.3d 378, ¶ 22. The error in these cases is unlike trial errors, which can be "quantitatively assessed in the context" of all the evidence. *Arizona v. Fulminante*, 499 U.S. 279, 307, 111 S. Ct. 1246, 1264 (1991).

¶108 The majority concludes, however, that the failure to submit any part of the determination of aggravating circumstances to a jury was not structural error. Op. at ¶ 44. I cannot agree. As the majority explains, in capital sentencing prior to *Ring II*, the trial proceeded in two phases, a guilt phase and a sentencing phase. Op. at ¶¶ 7-13. The first, before a jury, was concerned only with the question of conviction or acquittal of the crime of first degree murder. The second, tried to the court under Arizona's prior sentencing statute,

was concerned only with the issue of aggravating factors and mitigating circumstances. Each phase was tried to different factfinders on different issues. The Supreme Court, in these circumstances, has held that the sentencing phase resembles a separate trial, so much so that the double jeopardy clause applies both to the guilt phase and the sentencing phase. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2064 (1984); *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 1862 (1981) (double jeopardy protection attaches to capital sentencing proceeding); *Arizona v. Rumsey*, 467 U.S. 203, 209, 104 S. Ct. 2305, 2309 (1984) (Arizona capital sentencing proceedings resemble a trial for purposes of the double jeopardy clause). This was our view also. *See State v. Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983).

¶109 Complete denial of trial by jury at the sentencing phase, therefore, would seem to preclude harmless error analysis. The right to trial by jury is "fundamental to the American scheme of justice." *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S. Ct. 1444, 1447 (1968). The Supreme Court has now held defendants were entitled to a jury at the sentencing phase to determine the existence of the alleged aggravating factors but were denied that constitutional right. *Ring v. Arizona* 536 U.S., ___, ___, 122 S. Ct. 2428, 2443 (2002) *(Ring II)*. As noted, in Arizona denial of a jury trial is structural error. The same rule obtains in the federal system. *Sullivan v. Louisiana,* 508 U.S. 275, 281-282, 113 S. Ct. 2078, 2083 (1993) (the deprivation of the right to a jury trial unquestionably qualifies as structural error).

¶110 The majority rejects this conclusion and supports its decision on the basis of *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1927 (1999). Op. at ¶ 44. But *Neder* and the cases that rely on it are cases of trial error, not error in the structure or mechanism of the trial. Neder was tried to a jury which was present during the entire trial. The error consisted of the trial judge failing to instruct the jury on materiality, one of the elements of the crime of tax fraud. The difference is that in *Neder,* the jury was presented with all of the evidence, and the issue of materiality was uncontested. *Neder,* 527

U.S. at 15, 119 S. Ct. at 1836. The Supreme Court held this was trial error, reviewable under a harmless error analysis. *Id.*

¶111 The present cases are different. Unlike *Neder*, the error in these cases did not occur during the presentation of the case to the jury. Instead, the error was the complete absence of the jury during the penalty phase of the trial. The jury in Ring's trial heard no evidence, nor was it asked to make findings of any kind on the aggravating circumstances of the crime. And, even if such evidence may have been introduced at the guilt phase, it was not considered by a jury in the context of the death penalty. As a consequence, a jury verdict was never returned in these cases on the greater offense of capital murder. Thus, there is simply "no object, so to speak, upon which harmless-error scrutiny can operate." *Sullivan,* 508 U.S. at 280, 113 S. Ct. at 2082.

¶112 To apply harmless error review in these consolidated cases would encourage the court to speculate that reversal is not necessary because the non-existent jury would have convicted the defendant in any event. The court, in other words, would transform itself into a phantom jury. The argument is not supportable.

¶113 In these consolidated cases, the majority must concede that the jury was erroneously discharged before the trial was completed. If this permits harmless error review, then, one must suppose, we would also review for harmless error if the trial judge directed a verdict for the state on one or more elements of the charge, granted summary judgment on an element, or discharged the jury after it had determined some but not all of the charges. Such results are also unsupportable, in my view. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.*

¶114 Today's opinion puts the majority in the position of speculating about one of the great unknowables — what a nonexistent jury would

have done. We might argue about whether some or any degree of accuracy can be obtained by such speculation, but the argument is irrelevant. Both the state and federal constitutions guarantee defendants the right to trial by jury — not for one-half of the trial, not for two-thirds, fourfifths, or nine-tenths of the trial but for the whole trial. When the jury trial guarantee is violated, I believe structural error has occurred. The Constitution does not then permit judges to conclude the error was harmless; it requires the court to conclude that the trial mechanism violated the Constitution and the result should not be affirmed.

Stanley G. Feldman, Justice (Retired)

¶115 I concur in all but Part VI of the majority opinion and join in Justice Feldman's dissent as to that part.

Charles E. Jones, Chief Justice

Supreme Court, U.S.
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No. 03-15

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2002

STATE OF ARIZONA, Petitioner,

v.

DARREL PETER PANDELI, AKA DARREL PETER FLORIAN, Respondent.

Brief in Opposition to
Petition for a Writ of Certiorari to the
Supreme Court of Arizona

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Julie S. Hall
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Counsel of Record for Petitioner

71 pp

Pursuant to Rule 39, Rules of the Supreme Court, Respondent, Darrel Pandeli, hereby moves for leave to proceed *in forma pauperis* in the above-captioned action on the ground that he lacks sufficient funds to pay for fees and expenses.

Respondent is incarcerated under sentence of death in the Arizona State Prison in Florence, Arizona. Attached is Mr. Pandeli's declaration regarding his financial status. Mr. Pandeli was found indigent by the Arizona state courts. He has previously been found indigent by this Court. Pandeli v. Arizona, 536 U.S. 953, 122 S.Ct. 2654 (2002)(Mem). For these reasons, Respondent asks this Court grant this motion and allow him to proceed in forma pauperis.

Respectfully submitted this 2nd day of September, 2003.

Julie S. Hall

Julie S. Hall
Counsel of Record
9387 N. Painted Sky Dr.
Tucson, Arizona 85743

Attorney for Mr. Pandeli

DECLARATION

I, Darrel Peter Pandeli, swear under penalty of perjury that I am the Respondent in the above-entitled cause, that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner at the Arizona State Prison.

2. That within the last twelve months I have not received any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking or savings account and the only cash with which I am possessed is that which is within my prison account, which is of a minimal amount.

4. That I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

5. That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this declaration will subject me to penalties for perjury.

Darrel Pandeli

Darrel Peter Pandeli

No. 03-15

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Counsel of Record for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Respondent believes that, if certiorari were granted, this case would present the following questions:

1. Whether this Court has jurisdiction to review the Arizona Supreme Court's state law based criminal procedure decision below.

2. Whether the Arizona Supreme Court violates federal law by choosing to order resentencings in capital cases in which constitutional error occurred at the sentencing phase, an alternative left open to the States by this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990).

3. Whether a complete denial of the right to jury trial on sentence enhancing factors, recognized by this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), is structural error that cannot be held harmless.

4. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), extends to eligibility factors that involve convictions for other criminal conduct.

5. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), applies to eligibility factors that involve a balancing and qualitative assessment of aggravating circumstances.

6. Whether judge only capital sentencing violates the Sixth, Eighth or Fourteenth Amendments.

7. Whether resentencing is still required where the unconstitutional finding

of one aggravating factor was not, and could not be, deemed harmless.

8. Whether the Eighth Amendment principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), permit state courts to disregard evidence of mitigating circumstances because they were arguably not shown, by a preponderance of the evidence, to have caused the crime.

9. Whether, consistent with the Sixth, Eighth, and Fourteenth Amendments, the Arizona Supreme Court could have reaffirmed petitioner's death sentence without allowing the merits of his individual case to be argued or presented in any fashion.

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JURISDICTION

Respondent agrees that this Court has jurisdiction over this certiorari petition, though not over some of the state law questions the petition seeks to raise.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those set forth in the petition, this case involves the Tenth Amendment to the Constitution of the United States, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

This case also involves A.R.S. §§ 13-703 and 13-703.01, copies of which are set forth as Appendices A and B, respectively.

STATEMENT OF THE CASE

1. Arizona Capital Punishment Law After Ring v. Arizona

Immediately after this Court's *Ring* decision, the Arizona legislature was convened in special session to enact a new death sentencing statute. That statute was expressly made applicable to all cases in which direct appeal had not been finally resolved. 2002 ARIZ. SESS. LAWS, 5th S.S., Ch.1, § 7(A). The statute provided for a jury determination of all issues relating to guilt and sentence: defendant's guilt of first degree murder, the presence of aggravating circumstances, and the existence of sufficient mitigating circumstances to outweigh the aggravating circumstances. A.R.S. § 13-703.01.

Shortly thereafter, the Arizona Supreme Court consolidated all capital cases before it on direct appeal, including Mr. Pandeli's, for argument in *Ring*. In its decision in that case, the court determined that contrary to the defendants' arguments, violations

of *Ring*'s jury trial right could be held harmless. *State v. Ring*, 65 P.3d 915, 933-936 (Ariz. 2003)(*Ring III*). The court held that a sentence could be affirmed on the theory that the error was harmless, if and only if the court could conclude, that "no reasonable jury would have failed to find the factor established beyond a reasonable doubt" and "that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* at 946. This standard is substantially the same as Arizona's pre-*Ring* law regarding other forms of constitutional error in capital sentencing decisions by judges. *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)(refusing to affirm death sentence "[w]here there is a doubt whether the death sentence should be imposed"). However, it had another basis as well: the Arizona Supreme Court's determination that the legislature's intent would be frustrated if different sentencers evaluated the presence and strength of aggravation and mitigation. *Ring III*, 65 P.3d at 943; *see also State v. Bible*, 858 P.2d 1152, 1212 (1993)(expressing strong preference for remand where there is error in a capital sentence because fairness and accuracy are promoted by single factfinder who can consider all evidence).

2. Respondent's Case.

A. Mr. Pandeli's Childhood

Darrel Pandeli was victimized sexually both by men and women throughout his entire childhood. He was first sexually abused when he was about five years old, by a male friend of the family who, having asked Mr. Pandeli's mother to marry him, became a father figure to Mr. Pandeli. Reporter's Transcript (herein after "RT") 5/14/98 at 88. Mr. Pandeli's older brother walked in on this assault and subsequently participated. Id. When he was around nine years old, Mr. Pandeli was also violently sodomized, both

orally and anally, after being attacked at knifepoint. Id. at 89, RT 6/5/98 at 46. Mr. Pandeli was also molested when he was a child by at least two different adult women. RT 4/30/98 at 65-8. A thirty year old female neighbor raped Mr. Pandeli, who was twelve at the time. RT 5/14/98 at 94. The family characterized this traumatic event as an "affair," and not as a molestation. Id. Mr. Pandeli was raped repeatedly when he was about fourteen or fifteen years old. RT 4/30/98 at 61, 141; RT 5/14/98 at 47. The perpetrator forced Mr. Pandeli to submit to sodomy by threatening him with a bat, a crowbar, or a knife. RT 5/14/98 at 93. Mr. Pandeli was raised in an environment of familial instability, which traumatized and confused him as to his sexuality and sexual identity. RT 4/30/98 at 56, RT 5/1/98 at 107. Mr. Pandeli's mother frequently switched sexual partners and preferences. RT 4/30/98 at 53; 5/5/98 at 8, 22, 25. When Mr. Pandeli was sixteen years old, he survived financially by selling his body on the streets. RT 4/30/98 at 103; RT 5/14/98 at 112. Because Mr. Pandeli was mentally deficient and had no place else to go, around the time of the crime he lived with a man with whom he traded housing and other assistance for sex. RT 5/14/98 at 46. Mr. Pandeli had been afraid all of his life, and when he was eventually arrested, jail was the safest place he had ever been. Id. at 73, 116.

Mr. Pandeli was parentless virtually his entire life. His alcoholic and physically abusive father abandoned the family when Mr. Pandeli was young, and his mother, who suffered from depression, was frequently absent and always unstable, making her unable to care for her children. Id. at 34, 51, 62-9, 76; RT 4/30/98 at 21. The one time Mr. Pandeli's father agreed to take care of Mr. Pandeli, when Mr. Pandeli was twelve years old, Mr. Pandeli's father threw him into a wall, which had a nail in it. RT 5/14/98 at 56. Their utter abdication of parental responsibility exacerbated Mr. Pandeli's mental

deficiencies, and left Mr. Pandeli vulnerable to the sexual victimization which he suffered at the hands of others throughout his childhood. Id. at 28, 52, 74.

Mr. Pandeli attempted suicide on at least six separate occasions, including when he was merely ten years old. Id. at 34, 40, 43, RT 6/5/98 at 13. From his early childhood, Mr. Pandeli has suffered from mental illness, serious neurological dysfunction, disordered thought processes, ADHD, and lack of perspective, yet his mother's own disorders prevented her from persisting in seeking medical care for him. RT 5/1/98 at 35, RT 5/14/98 at 30. He was given Benadryl and Ritalin between the ages of five and six for behavior modification, but received no other mental health treatment for his illnesses. RT 4/30/98 at 24; 5/5/98 at 44; 5/14/98 at 31-2. He was placed in classes especially reserved for the mentally ill and mentally disabled, due to his unsound mental health and persistent learning disabilities. RT 4/30/98 at 23, RT 5/5/98 at 38, RT 5/14/98 at 20. Despite his constant attendance at school until the 11th grade, Mr. Pandeli failed virtually every class he ever took. He could not read or write until he learned in jail after his arrest in this case. RT 4/30/98 at 141; RT 5/14/98 at 23, 47.

Several members of Mr. Pandeli's family also battle extraordinary mental health problems. RT 4/30/98 at 93, RT 5/14/98 at 36. Both his brother and mother have diagnosed mental illness, and suffered from severe depression, yet were unable to seek medical assistance. Mr. Pandeli's father, uncle and grandfather, like Mr. Pandeli, have significant histories of suicide attempts. RT 5/14/98 at 37-8.

Mr. Pandeli has a strong genetic tendency toward alcoholism, as his biological father, both grandfathers, and brother were all alcoholics. Id. at 36, 78. Mr. Pandeli was also seriously addicted to alcohol since the age of twelve. Id. at 81. For a period

of three years, Mr. Pandeli consumed approximately two cases of beer per week. Mr. Pandeli's struggle with substance addiction began at age six, when his ten-year old brother gave him drugs. Id. at 39; RT 4/30/98 at 38, 137. He found when he began to use drugs and get high he was not as afraid for his safety. RT 5/14/98 at 58. Among the drugs Mr. Pandeli used throughout the majority of his life for self-medication were marijuana, alcohol, cocaine, methamphetamine, crystal methamphetamine, LSD, PCP, uppers, downers, ecstasy, heroin, and barbiturates. RT 5/1/98 at 33, RT 5/14/98 at 7-9, 79. At the time of the crime, Mr. Pandeli was using large amounts of alcohol and drugs, which were extremely debilitating to his already-impaired cognitive functioning. RT 5/14/98 at 82-3.

B. The Crime

Holly Iler was a prostitute who, on the night of her death, had alcohol and cocaine in her blood, as well as fresh needle marks on her body. RT 6/30/97 at 90, 127-8. Ms. Iler was hitchhiking that night. Mr. Pandeli offered to give Ms. Iler a ride in his van, and she accepted. Mr. Pandeli picked her up because he wanted to have intercourse with her, not because he wanted to harm her. Mr. Pandeli, too, was severely impaired by drugs and alcohol, having used crystal methamphetamine and alcohol both prior to and during the time he and Ms. Iler were together. RT 5/14/98 at 83-4, 164; RT 6/5/98 at 22. Mr. Pandeli and Ms. Iler stopped at a park near his residence where she agreed to have sexual intercourse in exchange for twenty dollars. They both went into the back of the van and disrobed. He put on a condom and attempted intercourse. He was unable to perform sexually, and because of his paranoia and history of sexual abuse, perceived this as a threat and became frightened. RT 5/14/98 at 108, 110. Mr. Pandeli asked for his money back. Ms. Iler

became furious and pulled a knife on him. RT 6/5/98 at 63. Due to his fear of being raped at knifepoint, Mr. Pandeli became terrified and "lost it." Id. at 63. Ms. Iler was killed during the ensuing struggle, in the midst of which Mr. Pandeli hallucinated, believing that his girlfriend had entered Ms. Iler's body and became her. RT 5/1/98 at 29. There was no evidence of sexual trauma to Ms. Iler's body. Id. at 151. A used condom was found which contained no semen. Three days after Ms. Iler's death, Mr. Pandeli gave a statement to police implicating himself in the incident.

C. The Capital Trial and Sentencing

Mr. Pandeli was convicted of premeditated first-degree murder on July 2, 1997. After the jury finding of guilt, the trial judge alone conducted a separate factfinding hearing to determine the existence or non-existence of aggravating and mitigating circumstances, and whether Mr. Pandeli should live or die. See A.R.S. § 13-703(B)(1997).

i. The Mitigating Evidence

Psychiatrist Dr. Donald Stonefeld, M.D., diagnosed Mr. Pandeli as suffering from paranoid schizophrenia and post-traumatic stress disorder (PTSD) both prior to and at the time of Ms. Iler's death. RT 5/1/98 at 10, 42, 65. Psychological testing reflected Mr. Pandeli's serious psychopathology possibly indicative of psychotic symptoms and behavior. Id. at 15. Dr. Stonefeld found that Mr. Pandeli's mental illnesses interfered with his perceptions of reality. Id. at 51. Mr. Pandeli was prone to delusional thinking and hallucinations, and was likely to be autistic and have fragmented, tangential, and bizarre thought processes. Id. at 16. Mr. Pandeli hallucinated during Ms. Iler's death, believing that his girlfriend entered Ms. Iler's body and became her. Id. at 29. The drugs and alcohol Mr. Pandeli ingested the night of the crime not only exacerbated his

mental deficiency, but diminished his ability to control his behavior. Id. at 33, 65-6, 109. Mr. Pandeli's schizophrenia and loss of control resulted in Ms. Iler's death and the removal of her nipples after her death. Id. at 87, 102. Many factors caused his involuntary actions: fear of being raped, panic at being unable to perform sexually, and panic over his fear of being homosexual. RT 6/5/98 at 63; RT 5/1/98 at 41, 107; RT 5/14/98 at 106-110. The PTSD Mr. Pandeli suffered stemmed from the violent, repeated sexual abuse Mr. Pandeli suffered throughout his childhood.

Dr. Stonefeld testified that Mr. Pandeli's chaotic and violent childhood, including repeated sexual victimization and his mother's hyper-sexuality, caused pathological confusion as to his sexuality and identity. Psychological testing revealed that Mr. Pandeli did not suffer from antisocial personality disorder. RT 5/1/98 at 25. Dr. Stonefeld formed these conclusions after spending many hours over a course of three years gathering critical social history information from both Mr. Pandeli and Mr. Pandeli's mitigation specialist. Id. at 8.

Based upon the evidence, Dr. Stonefeld concluded beyond a reasonable medical certainty that Mr. Pandeli's paranoid schizophrenia, compounded by intoxication and substance abuse, would have substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the incident. Id. at 65-6, 72, 109. Mr. Pandeli's impaired perception of reality was apparent since his childhood. Id. at 72. The mitigation specialist additionally confirmed that Mr. Pandeli was impaired on the night of the crime from his extensive substance abuse coupled with his traumatic childhood. RT 5/14/98 at 164, 168.

The state's psychologist, Michael Bayless, Ph.D, testified that Mr. Pandeli likely suffered from antisocial personality disorder with symptomatology of related cluster disorder such as histrionic, narcissistic, or borderline personality disorder. RT 6/5/98 at 3. Dr. Bayless observed characteristics in Mr. Pandeli that were consistent with male child sexual abuse survivors or individuals with paranoid schizophrenia. Id. at 24, 69. Nonetheless, Dr. Bayless opined that Mr. Pandeli was able to appreciate the wrongfulness of his conduct at the time of the crime, based on evidence that Mr. Pandeli attempted to eliminate evidence after the crime and initially denied involvement in the offense when questioned by police three days later. RT 6/4/98 at 95. Dr. Bayless disagreed with Dr. Stonefeld's diagnosis of paranoid schizophrenia, asserting that paranoid schizophrenia is "fully incompatible with someone like Pandeli who maintains an active social life and exhibits his ability to interact and make eye contact with others." *State v. Pandeli*, 26 P.3d 1136, 1149 (2001)(*Pandeli I*); RT 6/4/98 at 76-8. Dr. Bayless additionally opposed the diagnosis of paranoid schizophrenia because Mr. Pandeli only reported experiencing hallucinations when he was using drugs. RT 6/5/98 at 19. Dr. Bayless also claimed that Mr. Pandeli did not suffer from PTSD because Mr. Pandeli did not seem continually anxious or stressed when questioned by police several days after the offense. RT 6/4/98 at 65. Dr. Bayless came to these conclusions after spending approximately two hours with Mr. Pandeli.

ii. The Aggravating Factors

The judge, acting alone without the input of the jury, found two aggravating circumstances: that Mr. Pandeli had previously been convicted of a serious offense, as set forth in A.R.S. § 13-703(F)(2), and that the offense was committed in an especially heinous and depraved manner, as set forth in A.R.S. § 13-703(F)(6). The judge based

the latter finding on the injuries to Ms. Iler's body and the removal of portions of Ms. Iler's breasts, which it characterized as gratuitous violence and mutilation. Special Verdict [hereinafter "SV"] at 2.

iii. The Judge's Sentencing Decision

The defense proved by a preponderance of the evidence a wealth of mitigating mental health and familial history evidence, including several instances of childhood sexual abuse; neglectful parents; personality disorders; a sexual history wrought with confusion, fear, and despair; lifetime addiction to drugs and alcohol; abuse of drugs and alcohol the night of the crime; learning disabilities; probable mental disabilities; and repeated suicide attempts. SV at 6. The judge, however, concluded none of this evidence, when considered separately and collectively, was linked to the crime, and therefore merited no weight. SV at 6-7. The judge discounted evidence of Mr. Pandeli's childhood abuse, saying there was no evidence of consistent, ongoing sexual abuse and that Mr. Pandeli's family life was not as bad as some other, unidentified, capital defendants. SV at 7. The judge refused to find Mr. Pandeli could be rehabilitated, claiming personality disorders made Mr. Pandeli predisposed to act in ways harmful to others, even while acknowledging that Mr. Pandeli had not presented any problems while incarcerated for much of the previous five years. SV at 8; RT 7/15/98 at 23.

The judge then made the unilateral decision to impose the death penalty, as Arizona's sentencing statute then authorized. SV at 9; see also A.R.S. § 13-703(E).

D. The Direct Appeal

Considering the information never heard by any juror, the Arizona Supreme Court upheld the trial court's finding of the two aggravating circumstances. The Court

also upheld the trial court's refusal to find a causal connection between Mr. Pandeli's social history and mental health evidence and his behavior at the time of the crime. *Pandeli I*, 26 P.3d at 1150. The Court based this decision on a credibility choice between the state and defense experts in testimony never presented to the jury.

E. Pandeli II

Following this Court's grant of Mr. Pandeli's petition for writ of certiorari, *Pandeli v. Arizona*, 536 U.S. 953 (2002)(Mem), the Arizona Supreme Court reconsidered his case in light of *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*). *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003)(*Pandeli II*). After finding exempt from *Ring II* the trial court's finding of the prior conviction aggravating factor, the Court commented that "the State can make a strong argument that no reasonable jury could fail to find the F.6 factor." *Pandeli II*, 65 P.3d at 953. It did not decide this question, however, because it concluded it was required to reverse the case regardless based on its consideration of mitigating evidence and the sentencing calculus.

The court could not "say, beyond a reasonable doubt, that a reasonable jury hearing the same evidence as did the judge would have assessed the defense expert's testimony as did the judge and would have failed to find mental impairment, a statutory mitigating circumstance." *Id* (citation omitted). Because "[a] different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are 'sufficiently substantial to call for leniency,'" *Id* (citation omitted), as a matter of law, the court vacated the sentence of death and remanded for jury findings on each of those elements of the crime of capital murder. Petitioner now asks this Court to reverse that decision.

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT'S DECISION BELOW RESTS ON AN INTERPRETATION OF STATE PROCEDURAL LAW, AND REACHES A RESULT THIS COURT SAID WAS PERMISSIBLE IN *CLEMONS V. MISSISSIPPI*.

The state's real dispute is not with the Arizona Supreme Court's application of their holdings in *Ring III* to the decision in *Pandeli II*. The state actually seeks review of the holdings in *State v. Ring*, 65 P.3d 915 (Ariz. 2003)(*Ring III*). But the state did not seek either reconsideration of that decision in the Arizona Supreme Court, issued the same day as the decision attacked here, or certiorari review in this Court; instead electing to challenge that decision indirectly in Mr. Pandeli's case. Nevertheless, it is to *Ring III* that this Court must look to examine the basis for the outcome here. Doing so, it is apparent the state court acted well within its prerogative in both cases.

In *Ring III*, the Arizona Supreme Court held that the existence of one aggravating factor which is exempt from *Ring II*, implicit in a jury's verdict, or supported by overwhelming or uncontroverted evidence, does not end that court's harmless error inquiry. The court explained that "the procedures urged by the State [to end the harmless error inquiry after the finding of one aggravator is deemed harmless] do not reflect any sentencing procedure ever adopted by our legislature." *Ring III*, 65 P.3d at 943. The court went on to describe the consistency of Arizona's statutory capital sentencing scheme that has always "assigned to the same fact-finder the responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency." *Id.* The court explained "[t]he process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. [It refused to] speculate about how the State's proposal would impact this essential process." *Id.* The court then cited to *Johnson v. Nevada*, 59 P.3d

450 (Nev. 2002), holding that *Ring II* as applied to Nevada law requires a jury to reweigh mitigating and aggravating factors. *Id.* The court held the same result obtained here.

The court later discussed the need to have a jury decide mitigating circumstances under Arizona law: "Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty." *Id.* at 946. Citing Arizona's statute, the court concluded: "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* In Respondent's case, the court specifically referred to the state law discussion in *Ring III*, also citing the Arizona statute at issue, A.R.S. § 13-703. *Pandeli II*, 65 P.3d at 953.

This result is permissible under this Court's jurisprudence and dictated by the nature of Arizona's capital sentencing scheme. Arizona is a weighing state. *See State v. Richmond*, 886 P.2d 1329 (1994). In *Clemons*, this Court held that, when constitutional error occurred in a capital sentencing, appellate courts in weighing states could conduct harmless error review, but also could remand for resentencing. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990)(decision to reweigh or remand "is for state appellate courts. . .to make.")(footnote omitted). As explained above, the Arizona Supreme Court has decided, in deference to the Arizona legislature's policy of requiring pure jury sentencing, it should remand in all cases where it cannot say beyond a reasonable doubt that no reasonable jury would have imposed death. That is clearly a permissible choice under *Clemons*.

In fact, Respondent argued below that it is the only constitutionaliy permissible choice, as this sort of error is not properly subject to harmless error review. See Argument II.A. Although the Arizona Supreme Court held otherwise, its determination of the form that that harmless error review should take and the result that review should have in cases such as Respondent's, was reasonable and well within the parameters set by this Court in *Clemons*.

This Court does not sit to review such decisions of state law, state criminal procedure and state sentencing policy. *See* Sup.Ct. R. 10; *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)("if resolution of a federal question cannot affect the judgment, there is nothing for th[is] Court to do."). This Court has given its guidance regarding the Sixth Amendment in *Ring II*. It now should "give state judges a clear[ ] opportunity to develop state jurisprudence unimpeded by federal interference." *Arizona v. Evans*, 514 U.S. 1, 7 (1995), quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Even if this Court were to review the state law decision in this case, however, it would find that the Arizona Supreme Court's decision is a sensible one and is true to the legislative intent that was the Arizona Supreme Court's guide. Arizona has always viewed capital sentencing as something that involves qualitative as well as quantitative determinations. *State v. Van Adams*, 984 P.2d 16, 29 (Ariz. 1999)(noting that supporting evidence of cruelty "affects the strength of the cruelty factor, not its existence"), citing *State v. McKinney*, 917 P.2d 1214, 1225 (Ariz. 1996) (when conducting an independent review of the evidence, consideration is given to the "quality and the strength" of the aggravating and mitigating factors). The court has long recognized that Arizona's capital sentencing statute "does not require that the number of aggravating circumstances be weighed against the number of mitigating

circumstances." *State v. Mauro*, 766 P.2d 59, 81 (Ariz. 1988); *State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979)("One mitigating circumstance. . .may be 'sufficiently substantial' to outweigh two aggravating circumstances."). The court has explained:

> We do not believe the legislature intended the court to play a numbers game and automatically apply the death penalty when the number of aggravating circumstances found exceeded the number of mitigating circumstances found, any more than it intended to require life imprisonment when the number of mitigating circumstances found exceeded the number of aggravating circumstances found.

State v. Valencia, 645 P.2d 239, 241 (Ariz. 1982). For this reason, as the Arizona Supreme Court noted, the Arizona legislature has always felt it appropriate to put all decisions relating to capital sentencing–aggravation, mitigation, and penalty--in the hands of a single sentencer, who can bring the same qualitative judgment to the assessment of aggravation, mitigation and penalty. *Ring III*, 65 P.3d at 943.

This case shows why that approach makes sense. The mitigating evidence adduced in this case and found credible by the Arizona Supreme Court went both to the severity of both aggravating factors alleged, as well as the magnitude of the mitigation. The mitigating evidence and information regarding the defendant's mental state and history adduced below went both to the severity and weight to be given to the two aggravating circumstances as well as the mitigation to be weighed against them. Both aggravating facts were directly related to the defendant's background and disorders. The "heinousness" based on "mutilation" is directly attributable to the Respondent's mental illness, and background of victimization by severe sexual abuse. So is the "second" homicide, which occurred as a result of the same disabling forces. To view those aggravating facts in isolation and without the truer picture provided by the life history information would be to fail to fully assess their weight, as well as their identity and number, which Arizona requires. To artificially divide up the task of assessing

aggravation and mitigation in light of such background facts would increase the chance of error and arbitrariness in capital decision making. That no doubt is why the Arizona legislature felt it appropriate to put the sentencing decision in the hands of a single sentencer, under both statutory regimes. And that no doubt is why the Arizona Supreme Court decided to follow that state legislative dictate in this case and the others it reviewed after *Ring II*.

In any event, Arizona's decision to do that does not offend or contravene anything in the federal constitution, or this Court's applicable decisions. To the contrary, it is a choice specifically left open to the states by *Clemons*, and by *Ring II*. *Ring II*, 536 U.S. at 609, n.7. The exercise of that choice does not call for certiorari review by this Court.

Petitioner emphasizes the different results obtained by several state courts in applying *Ring II* to individual state sentencing schemes. This result, however, obtains because each state sentencing scheme is unique, and each state's law must be applied to that scheme in light of state policy and practice. As noted in *Ring III*, the Nevada Supreme Court's decision on this issue was controlled by Nevada law.[1]

Similarly, in *Woldt v. Martinez*, the Colorado Supreme Court held that Colorado's "three-judge panel capital sentencing statute. . .is unconstitutional on its face under *Ring*" but that defendants sentenced under that statute were entitled to resentencings "under Colorado law[.]" 64 P.3d 256, 262 (Colo. 2003). The court cited to Colorado law

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[1]The court held: "Nevada statutory law requires two distinct findings to render a defendant death-eligible: 'The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.' This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing." *Johnson v. State*, 59 P.3d at 460 (italics in original)(footnote omitted).

interpreting the Colorado death penalty statute in determining which jury findings were eligibility findings. *Id*, at 264 (quoting *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

The legal landscape developing after *Ring II* may not be homogenous, but it is not in conflict. Each state has interpreted this Court's decision according to their state capital punishment laws and, as long as those decisions do not violate the requirements of *Ring II* and were left open to them in *Clemons*, that is all this Court requires.

The state complains that twenty-six capital cases will be affected by this decision. However, of the 31 cases on direct appeal when *Ring II* was announced, seven have been resolved on grounds other than *Ring II*, and in an additional three cases similar to Mr. Pandeli's, the time for filing cert has already run without a petition from the state. At this rate, only this and a handful of other cases would be affected were this court to accept, wholesale, Arizona's arguments in this petition. Even then, given historical error rates in Arizona, the sentences in most of those cases would be eventually reversed in later proceedings. *See* James S. Liebman, et. al., *A Broken System, Part II: Why there is so much error in capital cases, and what can be done about it* (visited Sept. 26, 2002), http://www.law.columbia.edu/brokensystem2>. Rather than delay capital proceedings in Arizona for yet another year, fairness and judicial economy favor allowing the jury resentencings that the Arizona courts have ordered under the new statutory procedures the Arizona legislature has prescribed, to begin.

II. THE ARIZONA SUPREME COURT'S DISPOSITION OF THIS CASE CAN AND SHOULD BE AFFIRMED ON OTHER GROUNDS.

If certiorari were granted, this Court would have to consider whether the Arizona Supreme Court's decision is correct for other reasons that were argued to it, but not necessarily adopted by it before considering relief on the grounds urged by Petitioner.

There are a number of such reasons which should lead this Court to affirm the decision below. *Arizona v. Fulminante*, 499 U.S. 279, 282 (1991)(decision may be affirmed on grounds other than those stated by lower court).[2]

A. Denial of the Jury Trial Right Guaranteed by Ring is Structural Error That Should Not be Subject to Harmless Error Review.

This Court has held that unlike "an error in the trial process itself . . . structural defects in the constitution of the trial mechanism" can never be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). Thus, this Court has refused to find harmless error when the right to jury trial has been "altogether denied," because in such a case "the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

That is precisely the case here. The error was not one by the trial judge, or in the trial process, but rather in the statutory structure governing capital sentencing – a classic "structural defect in the constitution of the trial mechanism" – that "altogether denied" capital defendants their Sixth Amendment right to have eligibility determinations made by a jury beyond a reasonable doubt. The Arizona statute assigned to the "wrong entity" – the judge – the job of determining the defendant's guilt as to those determinations. As the two *Ring III* dissenters recognized, harmless error review in cases like this "puts the [appellate court] in the position of speculating about one of the great unknowables-what a non-existent jury would have done." *Ring III*, 65 P.3d at 948 (Feldman, J., concurring in part and dissenting in part). Harmless error

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[2]Because Respondent is not seeking to change the judgment below, which properly ordered a full sentencing retrial, he has not filed a formal cross petition raising these issues, but would seek to have them considered in the event certiorari were granted. *See* ROBERT L. STERN, ET. AL, SUPREME COURT PRACTICE, at 363-364 (7th ed. 1993).

analysis cannot apply in such a case.

B. The Jury Trial Right Recognized in Ring Properly Applies to Aggravating Factors Involving Convictions for Other Criminal Conduct: Almandarez-Torres Should be Overruled.

As Justice Thomas' concurrence in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) shows, this Court's decision in *Almandarez-Torres v. United States*, 523 U.S. 224 (1998), suffered from the same constitutional error as *Walton v. Arizona*, 497 U.S. 639 (1990). Petitioner argues that the prior conviction aggravating circumstance found by the trial judge should have determined the outcome here because it exempts the case from the decision in *Ring II*. Thus, if certiorari were granted here, the case will necessarily present the threshold question of whether, in light of the history reviewed there and in Ring, this Court should overrule *Almendarez-Torres*.

The Arizona Supreme Court relied on *Almendarez-Torres* in finding the trial judge's determination of the prior conviction aggravating factor harmless. This is problematic for several reasons. First, it misapprehends the holding in *Almendarez-Torres*. As *Apprendi* noted, the defendant in *Almendarez-Torres* pleaded guilty, and in so doing, both waived his right to jury trial and admitted the previous felony convictions. Thus, the case before this Court only dealt with the sufficiency of the underlying indictment under the Fifth Amendment, and presented "no question concerning the right to a jury trial." *Apprendi*, 530 U.S. at 488. That question was presented in *Ring II*, where this Court held that "[c]apital defendants . . . are entitled to a jury determination of *any* fact on which the legislature conditions an increase in their maximum punishment." *Ring II*, 122 S. Ct. at 2432 (emphasis added). The fact of prior conviction squarely meets that description. *See also Apprendi*, 530 U.S. at 487, 489-90 (holding that even assuming arguendo that *Almenderez-Torres* was correctly decided, it is "at

best an exceptional departure" from the rule announced in *Jones* and *Apprendi*).

Moreover, Justice Thomas, voting with a five-member majority in *Almendarez-Torres*, repudiated his vote less than a year later, making clear that he now regards *Almendarez-Torres* as wrongly decided. *See Apprendi*, 530 U.S. at 518-21 (Thomas, J., concurring). Thus, it is plain that a five-Justice majority of this Court no longer adheres to that decision.

Third, even if *Almendarez-Torres* remains applicable in the application of *Ring II* in some states, it's logic does not apply in Arizona. The statute at issue in *Almendarez-Torres* was a recidivist statute. This distinction compelled the result in that case because recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence," 523 U.S. at 243 (citations omitted), and thus was not an element of the offense in question. Id, at 243-244. Arizona, conversely, elected in the capital context to make prior convictions not a penalty for recidivism, but an element of the crime of capital murder as much as any other aggravating factor listed in A.R.S. § 13-703(f). As that court has explained on numerous occasions:

> Our death penalty statute is not a recidivist or enhancement statute used to warn convicted criminals or encourage reform. . .. The purpose of the aggravation/mitigation hearing is to determine the character and propensities of the defendant. . .. That a defendant has been found guilty of another offense for which life is imposable is directly relevant to this determination. . ..

State v. Walden, 905 P.2d 974, 994-995 (1995)(citations omitted). Therefore, Arizona's death sentencing statute explicitly treats prior convictions as elements of the crime of capital murder, not as recidivist penalty enhancements, and thus does not fall within the narrow exception carved out in *Almendarez-Torres*, but falls squarely within the

mandate of *Ring II*. Thus, even if this Court were to grant the petition for writ of cert and reverse the opinion of the Arizona Supreme Court, Mr. Pandeli would still be entitled to re-sentencing under Arizona law.

C. The Jury Trial Right Recognized in Ring Properly Applies to the Aggravation/Mitigation Balance in States Which Make That Assessment an Eligibility Factor.

Although this Court did not reach the question in *Ring II*, the Arizona Supreme Court's analysis of the weighing question is also correct under federal law. The rule of *Ring II* is this: "[c]apital defendants. . .are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 588. Put in context, if a state conditions a sentence of death on the fact that mitigating factors do not outweigh aggravating factors, a jury determination is required. Arizona has done precisely that. The weighing finding in Arizona is not, and never has been, a stage at which the factfinder selects whether or not the defendant should receive death. In fact, until and unless the weighing factor is found, a defendant is categorically excluded from receiving the death penalty. *Ring II* requires that the jury verdict "reflect" the facts the jury found beyond a reasonable doubt "necessary to put . . [the capital defendant] to death." *Ring II*, 536 U.S. at 609. Because the weighing calculus is a necessary factor in an Arizona death sentence, it must be found by a jury beyond a reasonable doubt.

A consensus has developed among all but two death sentencing states that this factor must be determined by a jury, indicating almost total acceptance that the weighing fact is indeed an element of capital murder. This broad recognition in all relevant states that weighing is an element of the crime of capital murder adds force to Justice Breyer's concurring opinion in *Ring II*, and merits further review by this Court.

D. The Logic of Ring II, and Developments Since Ring II, Make it Apparent That Judge Only Capital Sentencing is Unconstitutional Under the Sixth, Eighth and Fourteenth Amendments, and Spaziano and Cabana Should be Overruled.

The Constitution requires special safeguards in capital cases. *Gregg v. Georgia*, 428 U.S. 153 (1976). In addition to all of the reasons set forth in Justice Breyer's concurring opinion in *Ring II*, the evidence of legislative and judicial agreement since *Ring II* that the weighing of aggravating and mitigating circumstances is an element of the crime of capital murder demonstrates juries must make the ultimate sentencing decision. If this Court grants Arizona's request for cert review, this Court should also consider that evolving standards of decency require *Spaziano v. Florida*, 468 U.S. 447 (1984), be overruled on that basis.

Considering statutes enacted both before and after *Ring II*, 36 states have now given sentencing authority to juries. Only Montana and Nebraska fail to do so. MONT. CODE ANN. § 46-18-301; NEB. REV. STAT. § 29-2521. All but three of the 36 states make juries' determinations of sentence controlling.[3] This is an overwhelming indication that jury sentencing is required by the Eighth Amendment and is an established part of due process. *See Atkins v. Virginia*, 536 U.S. 304, 314-315 (2002)(discussing 18 states which prohibit execution of the mentally retarded in judging evolving standard of decency by legislative decision), *Enmund v. Florida*, 458 U.S. 782, 789 (1982)(noting that only eight states permitted death sentences in cases where

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[3]Only in Florida, Alabama, and Delaware do judges retain sentencing authority after the jury's decision is reached. FLA. STAT. CH. § 921.141; ALA. CODE § 13A-5-47 (1975); DEL. CODE ANN. Tit. 11, § 4209. In Florida, the jury's sentence determination must be considered and given great weight. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Alabama requires the sentencing judge to consider the jury's recommendation of sentence before making its decision. ALA. CODE § 13A-5-47 (1975).

defendant participated in underlying felony but did not attempt or intend to kill). Given the nearly unanimous enactment of jury sentencing by state legislatures, Justice Breyer's dissent in *Ring II* is correct. *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Cabana v. Bullock*, 474 U.S. 376 (1986), should be overruled and these questions, too, will necessarily be included in the issues presented by this case, if certiorari is granted here.

E. The Arizona Supreme Court Did Not, and Could Not, Find the Denial of a Jury Trial on Heinousness to Be Harmless.

The Court did not, as Petitioner contends, hold the finding of the especially cruel, heinous, and depraved aggravating circumstance harmless beyond a reasonable doubt. The Court commented that "the State can make a strong argument that no reasonable jury could fail to find the F.6 factor." *Pandeli II*, at 953. It did not need to decide this question, however, because the court could not "say, beyond a reasonable doubt, that a reasonable jury hearing the same evidence as did the judge would have. . .failed to find mental impairment, a statutory mitigating circumstance." *Id* (citation omitted). Because "[a] different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are 'sufficiently substantial to call for leniency,'" *Id* (citation omitted), the court was required to remand for jury findings on each of those elements of the crime of capital murder. It therefore did not rule on the harmlessness of the especially cruel, heinous, or depraved aggravating factor.

The court could not have determined this finding by the trial judge, rather than a jury, was harmless. Mr. Pandeli's social history is tragically replete with the sexual abuse he suffered as a child. He was repeatedly traumatized by adult strangers, and even by those who had a responsibility to keep him safe. A reasonable juror could have found this compelling social history evidence rebutted the aggravating evidence

of mutilation and gratuitous violence. In Arizona, a finding of mutilation--and hence the finding of the especially cruel, heinous, and depraved aggravating factor in this case--requires a determination that the killer had in mind the purpose of mutilating the body of the deceased. *State v. Richmond (III)*, 886 P.2d 1329, 1336 (1993)(finding of mutilation requires some demonstration that the defendant acted with a "separate purpose to mutilate the corpse"), *quoting State v. Richmond (II)*, 666 P.2d 57, 68 (1983). A reasonable juror could have found that the damage to the victim's body was not a result of an intent to mutilate the corpse, but a tragic reaction to the trauma still haunting Mr. Pandeli. Similarly, a reasonable juror could have found the aggravating factor's gratuitous violence aspect unsupported by the thoughts and actions of this gravely damaged and impaired individual. As a result, even if the Arizona Supreme Court had adopted the state's interpretation of the statute regarding the balancing of aggravating and mitigating circumstances, the court would not have upheld Mr. Pandeli's death sentence.

The rule of *Ring II* does not require a jury determination of "one fact" or "the first fact" but "any fact." *Ring II*, 536 U.S. at 589. Thus, a finding that the prior conviction aggravating factor was exempt from *Ring II* did not end the inquiry because the court was still required to consider the second aggravating factor, which was also a fact which increased the range of Mr. Pandeli's punishment to death. Even if the Arizona Supreme Court improperly held Arizona law requires a remand for a jury determination regarding the relative weight of the aggravating and mitigating factors, remand was still necessary for the determination of this aggravating factor.

F. The Arizona Courts Violated *Lockett v. Ohio* and *Eddings v. Oklahoma* By Disregarding Mitigating Evidence Where It Is Not Shown To Cause The Defendant's Conduct At The Time Of The Crime.

1. Evidence of a Traumatic Family and Developmental History Is Relevant Mitigating Evidence.

This Court has repeatedly stressed the important and unquestionably mitigating nature of evidence that a capital defendant suffered from childhood abuse, even when the evidence is completely unrelated to the crime for which the defendant is sentenced. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)("There can be no doubt that evidence of a turbulent family history, [and] of beatings by a harsh father ... is particularly relevant [to mitigation]."); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)(evidence of childhood abuse is relevant to a capital defendant's "moral culpability" and jurors must be allowed to consider that evidence in assessing punishment); *Burger v. Kemp*, 483 U.S. 776, 789, n.7 (1987)(there is "no doubt" that evidence of a defendant's "exceptionally unhappy and unstable childhood" is "relevant mitigating evidence"). This Court finds evidence of childhood abuse relevant and undeniably mitigating. And this Court does not restrict the consideration of mitigating factors to only those shown to have caused defendants' actions at the time of the crime. See *Williams (Terry) v. Taylor*, 120 S.C. 1495, 1512-1514 (2000)(reversing for defense counsel's failure to investigate and present evidence that documented childhood abuse). Evidence of childhood abuse must be considered as non-statutory mitigation, even if that evidence does not provide a legal excuse from criminal responsibility. *Eddings*, 455 U.S. at 114.

Obviously, extensive childhood abuse and neglect damages one's emotional health. "It defies reason and common experience to suggest that a youngster coming out of [a horrific environment] was largely unaffected and should be held accountable as any functioning adult." *State v. Hoskins*, 14 P.3d at 1031 (Zlaket, C.J., dissenting). As Chief Justice Rehnquist recognized, "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority

to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745 (1982). Although medical science is not yet fully capable of quantifying and tracing the causal relationship between such abuse and criminal behavior, medical literature does reveal how childhood physical abuse may have long-term negative repercussions for the defendant's ability to make appropriate judgments, to understand the consequences of his actions, and to control his behavior. Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications For The Death Penalty*, 77 N.C.L.REV 1143, 1185 (1999). Medical literature shows that sexual abuse is extraordinarily destructive to a child's psyche, especially for young males, in whom sexual abuse causes the most emotional and psychological distress, intense fear, anxiety, and stress. RT 5/14/98 at 86-7.

A sentencer must not be precluded from considering a capital defendant's proffered mitigating evidence of "any aspect of defendant's character, or record, and any of the circumstances of the offense" in all but the rarest of cases. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Evolving standards of decency and "the fundamental respect for humanity underlying the Eighth Amendment" require individualized sentencing "as a constitutionally indispensable part of inflicting the death penalty." *Eddings v. Oklahoma*, 455 U.S. at 114, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Evidence of childhood abuse is relevant in sentencing because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable" than others. *Penry*, 492 U.S. 302, 319 (1989), quoting *California v. Brown*, 497 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The sentencing body must have a vehicle for assessing the mitigating nature of the evidence that reflected on the defendant's personal culpability to determine what sentence is warranted. *Penry*, 492 U.S. at 322. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114. Although courts "may determine the weight to be given relevant mitigating evidence[,]" they "may not give it no weight by excluding such evidence from their consideration." *Id.*, 455 U.S. at 115. Restricting consideration of mitigation creates a risk of an inappropriately severe sentence. *Lockett*, 438 U.S. at 605. Since "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Id.* at 604, states must be able to consider the mitigating evidence of childhood abuse without having to first find a causal connection between the abuse and the crime. Since it is mitigation, the sentencer should include it in the weighing process.

2. The Arizona Courts Flatly Refuse to Recognize This Court's Prior Holdings That a Traumatic Upbringing Is Mitigating Evidence.

Mr. Pandeli's horrific childhood and resulting emotional troubles were clearly established in a court of law by a preponderance of the evidence. The Arizona Supreme Court agreed that Mr. Pandeli was subject to repeated sodomy throughout his childhood, had a neglectful mother and absent father, attempted suicide several times, had learning disabilities and unsound mental health, was forced to sell his body on the streets, and had a sexual history wrought with violence and confusion. *Pandeli I*, 26 P.3d at 1147-1150. Although the Arizona Supreme Court found Mr. Pandeli's proffered evidence of his "family and developmental history" and "mental/emotional health" credible, it refused to consider this evidence as mitigation because there was no causal

connection between his abysmal childhood and his appreciation of the wrongfulness of the conduct or ability to control his conduct. *Id.*, 26 P.3d at 1150-51.

Courts in other jurisdictions have faithfully followed this Court's precedent and determine that evidence of a traumatic upbringing is mitigating.[4] Arizona, however, regularly dismisses uncontroverted evidence of childhood abuse as irrelevant in the absence of proof that it somehow caused the crime. The Arizona Supreme Court has historically restricted its consideration of mitigation where a defendant proves that he suffered an abusive childhood. The Court repeatedly refuses to consider evidence of a dysfunctional family as mitigation without a causal connection to the defendant's ability to perceive, comprehend, or control his actions. See *State v. Sansing*, 26 P.23d 1118, 1131 (2001); *State v. Hoskins*, 14 P.3d 997, 1023 (2000); *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999); *State v. Mann*, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997); *State v. McKinney*, 185 Ariz. 567, 587, 917 P.2d 1214, 1233 (1996); *State v. Laird*, 186 Ariz. 203, 920 P.2d 769 (1996); *State v. Murray (Robert)*, 184 Ariz. 9, 906 P.2d. 542 (1995); *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995); *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), *cert. denied*, 516 U.S. 878 (1995). Sentencing judges are prevented, as a matter of Arizona law, from considering proven evidence of a difficult upbringing unless a causal connection is established.

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[4]*See Wright v. Cowan*, 149 F.Supp.2d 523, 527-38 (C.D.Ill.,2001) (traumatic childhood is mitigating); *Boyd v. French*, 147 F.3d 319, 325 (4th Cir. 1998) (troubled upbringing entitled is mitigating); *Blanco v. State*, 706 So.2d 7, 10-11 (Fla. 1997) (impoverished childhood is mitigating); *State v. Raglin*, 699 N.E.2d 482, 497 (Ohio 1998) (difficult childhood can be entitled to meaningful weight); *Guthrie v. State*, 689 So.2d 948 (Ala.Cr.App. 1996) (finding as nonstatutory mitigation that defendant's childhood was "not all that it could have been"); *Coleman v. State*, 741 N.E.2d 697 (Ind. 2000) ("difficult childhood" was entitled to some mitigating weight), *Buttrum v. State*, 293 S.E.2d 334 (Ga. 1982)(deprived childhood is mitigating).

> A dysfunctional family background or difficult childhood can be mitigating only if the defendant can establish that early experiences, however negative, affected later criminal behavior in ways that were beyond his control. Thus, family dysfunction ... can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts.

Hoskins, 14 P.3d at 1021. "The factual circumstances of defendant's childhood, though extremely difficult, *do not translate into relevant mitigation* of his premeditated crimes." *Id.* (emphasis added).

The Arizona statute challenged herein, A.R.S. § 13-703, was found over 10 years ago in *Walton v. Arizona* to be constitutional because Mr. Walton was "not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence," but instead was challenging the burden of proof by which mitigation should be considered. 497 U.S. 639, 649 (1990). This Court expressly stated that it "has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." *Id.* "A state may not preclude by statute, nor may a sentencer refuse to consider, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114.

Since *Walton*, however, the Arizona Supreme Court has repeatedly excluded an entire category of mitigating evidence offered by capital defendants: mitigating factors that could not be or were not proven to have caused the crime. Arizona courts are not *able* to consider a difficult childhood as mitigation, statutory or non-statutory, unless the causal connection is established; thus, entire types of mitigation are precluded in violation of the rule set forth in *Walton*.

This Court found such practice impermissible, where "the sentencing judge did not evaluate the evidence and find it wanting as a matter of fact; rather he found that as a matter of law he was unable to even consider the evidence." *Eddings*, 455 U.S. at

113. A categorical denial of credible evidence of a traumatic childhood because it did not cause the crime is tantamount to denying that evidence as a matter of law. There is a valid distinction between merely disbelieving evidence which a defendant offers and precluding consideration of that mitigating evidence altogether when it is proven. The latter approach, which Arizona takes, is unconstitutional.

After all mitigating evidence is allowed in for consideration, then federal law allows states to structure their consideration of mitigating factors. For example, if a state decided to give more weight to the mitigating factor of age than to the mitigating factor of good behavior in prison, it could do so. Here, there was no "vehicle," under Arizona law, for the sentencing court to "express[] its 'reasoned moral response'" to the mitigating evidence. See *Penry I*, 492 U.S. at 328, and *Eddings,* 455 U.S. 104. A sentencing scheme that precludes individualized sentencing "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind." 492 U.S. at 304. Thus, the causal connection requirement, which excludes relevant evidence and deems it irrelevant, is a direct violation of the Eighth Amendment protections carved out in *Lockett*, *Eddings,* and their progeny.

3. Even If a Causal Connection Were Constitutionally Permissible, Such Connection Was Demonstrated In This Case.

The unrelenting sexual abuse perpetrated upon Mr. Pandeli was but one of the constellation of traumas to which Mr. Pandeli was subjected all his life. Prior to the age of seven, Mr. Pandeli suffered assault, neglect, drug and alcohol addiction, serious learning disabilities, and an extraordinarily dysfunctional upbringing. RT 5/14/98 at 47-50. It is reasonable to assume that where an intoxicated, addicted, mentally ill, learning disabled, traumatized victim of childhood sexual abuse, who is prone to

hallucinations, perceives a threat from a sexual situation, his history will affect his actions. A causal connection is patently obvious from the facts: a boy who was repeatedly sodomized, forcibly raped at knifepoint, and molested by older women then turns into a mentally ill man who, in the midst of a sexual situation that induces a hallucinogenic panic, removes a portion of the victim's breasts from her body. Even though a qualified medical professional explicitly stated the obvious, that Mr. Pandeli's horrific childhood affected his capacity to control or comprehend his actions on the night of the crime, the Arizona Supreme Court refused to find a causal connection. As shown from Mr. Pandeli's case, Arizona's requirement that such a relationship be proved thus effectively prevents the sentencer from considering such evidence at all in most cases. If Certiorari should be granted here, Arizona's gross and systemic disregard of the teachings of *Lockett* and *Eddings* should be corrected.

G. Respondent Was Denied His Right to Counsel When the Arizona Supreme Court Consolidated His Case with 30 Others and Appointed One Lawyer to Brief and Argue for All Defendants.

Following this Court's remand of Respondent's case to the Arizona Supreme Court for consideration in light of *Ring II*, the Arizona Supreme Court consolidated Respondent's case with those of thirty other capital defendants then pending direct appeal. The Court further ordered that one "lead counsel" would be responsible for all briefing and argument before that Court. Although Respondent objected repeatedly to this process, he was forced to accept representation by one lawyer, counsel for Timothy Ring. As a result, Respondent was not able to present all of the arguments entitling him to relief. By compelling him to accept conflicted counsel and forcing him to rely on the truncated and over-generalized arguments that resulted, Respondent was deprived of effective representation under the Sixth Amendment.

Arizona requires that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Ariz. R. Sup.Ct. 81, Canon 3.B(7). The ethical requirement that a court must allow a defendant the right to be heard was more compelling here, for the requirement fulfills the constitutional mandate for the enactment of capital sentencing statutes by the states. To pass constitutional muster, a capital sentencing scheme must allow for an individualized determination of death-worthiness that includes a full consideration of any mitigating circumstances, and that weighs the appropriateness of the death sentence for the person and the crime.

> For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence."

Penry v. Johnson, 532 U.S. 782, 797 (2001)(internal citations omitted).

By adopting the consolidation strategy, the vast majority of the thirty-one defendants were not heard. Not only were the procedural postures of the defendant's cases varied,[5] but at least seven different aggravators were at issue, in some cases singly and in others in combination. By allowing the filing of only one brief, and the argument of only one lawyer – and that a lawyer totally unfamiliar and incapable of becoming familiar with the specific facts and legal issues pertinent to most of the appellants' crucial arguments – it was impossible for the court to be adequately informed on the issues before it. This precluded an application of law to the facts of an individual's case.

[5] The procedural postures of the consolidated case ranged from appellants who had not even filed their appellate briefs to appellants whose appeals had been decided, and remanded by this Court after certiorari review.

The reality of the consolidation orders was this: regardless of which counsel attempted the impossible task of effectively drafting and filing the brief, no counsel could be selected who represented a client on every issue involved. Thus, of necessity, on numerous issues, clients did not receive the critical ingredient of undivided loyalty and diligent and zealous advocacy to which each was entitled. Yet, given that this was the only brief the court considered on behalf of Respondent on these life and death issues, his counsel had no alternative but to include Respondent on the brief despite serious concerns about arguments and facts included in, and omitted from, the brief.

The conflict was magnified at oral argument. The court allowed one forty-five minute argument by one counsel on the varying issues, only a few of which affected all Appellants and most of which affected only some, but not other, Appellants. Although any oral argument requires counsel to choose what issues on which to focus, this case presented additional, insurmountable obstacles to the counsel who attempted to represent all of the Appellants, including those whose best interests diverged from arguing counsel's client.[6] Arguing counsel had an obligation to select issues to argue that would not harm his client or any other appellant in the consolidated group. Of course, that could not be done. Even if it could, counsel would necessarily have violated his duty of loyalty and zealous representation to the individual client to represent only the client's interests, and not serve two, much less thirty, other masters

[6]For example, arguing counsel's client, Timothy Ring, was convicted of one, and only one, aggravating factor: pecuniary gain. Respondent was convicted of two aggravating factors: prior conviction and especially cruel, heinous, and depraved. Mr. Ring's case, then, did not even present several issues critical to Respondent: 1) whether prior conviction aggravating factors are exempt from *Ring II*; 2) whether a finding of one aggravating factor which arguably does not violate *Ring II* ends a court's inquiry; and 3) whether the especially cruel, heinous, and depraved finding by a judge can ever be harmless.

with varying and conflicting interests. See *Glasser v. United States*, 315 U.S. 60, 75 (1942). In the final analysis, the consolidation procedure allowed no Appellant to receive what the constitution requires: an effective counsel who "play[s] the role of an active advocate, rather than a mere friend of the court," *Evitts v. Lucey*, 469 U.S. 387, 394 (1985), and who observes a duty of "zealous and loyal representation," *Nix v. Whiteside*, 475 U.S. 157, 188 (1986). And the most insidious element of the harm is that it is most apparent in what is not apparent at all, hidden from view by the sin of omission. As this Court explained in *Holloway v. Arkansas*, 435 U.S. 475, 489-490 (1978): "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."

In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), this Court explained that a fair trial depended upon adversarial testing, and that adversarial testing in turn depended upon effective counsel:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Id. This Court also defined what counsel was expected to bring to the court on behalf of his client:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

> Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Id. at 688. Here, by asking one lawyer to write and speak on behalf of all thirty-one, the court promoted precisely the opposite: conflicted counsel who was put into a position where he could not advocate any single appellant's cause, and was placed under restrictions of time and space so that he could not utilize his skill and knowledge on behalf of each appellant. Unable to advance arguments that reflected effective counsel to each appellant, his representation of all was *per se* ineffective.

These concerns are no less vital on appeal. *Penson v. Ohio*, 488 U.S. 75, 86-88 (1988). It is the responsibility of the appellate court to ensure that counsel's representation "be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." *Glasser v. United States*, 315 U.S. at 70. *See also, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) (Kennedy, J., dissenting) ("[T]he lawyer's duty of loyalty long has precluded the representation of conflicting interests."). The conflict and its consequences were presented repeatedly to the court, which in turn ignored the conflict, presumptively undermining the adversarial process. *Mickens v. Taylor*, 122 S.Ct. 1237, 1241-1242 (2002)(*quoting Holloway*, 435 U.S. at 488, 490 (1978) ("The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively seal his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors."); *see also Glasser*, 315 U.S. at 71

("instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights.) A cert grant which might result in a remand to the Arizona Supreme Court should address this issue of whether Respondent was denied his right to counsel on appeal due to the conflict.

CONCLUSION

Because the Arizona Supreme Court's decision rests on state law, and because the disposition of the case this petition challenges is correct for a number of reasons in addition to those adopted by the Arizona Supreme Court, the petition for certiorari should be denied. If the petition is granted, the Arizona Supreme Court's decision should be affirmed for all the reasons set out above.

Respectfully submitted,

Julie S. Hall

Julie S. Hall

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2003, one copy of the attached document was deposited in the United States mailbox, first-class postage prepaid, and addressed to counsel for the State of Arizona, Mr. Kent Cattani, Office of the Attorney General, 1275 West Washington, Phoenix, AZ 85007. I further certify that all parties required to be served have been served.

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APPENDIX A

A.R.S. § 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in section 13-703.01. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age.

B. At the aggravation phase of the sentencing proceeding that is held pursuant to § 13-703.01, the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence applicable to criminal trials. The burden of establishing the existence of any of the aggravating circumstances set forth in subsection F of this section is on the prosecution. The prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt.

C. At the penalty phase of the sentencing proceeding that is held pursuant to § 13-703.01, the prosecution or the defendant may present any information that is relevant to any of the mitigating circumstances included in subsection G of this section, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The burden of establishing the existence of the mitigating circumstances included in subsection G of this section is on the defendant. The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence. If the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist. Each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty.

D. Evidence that is admitted at the trial and that relates to any aggravating or mitigating circumstances shall be deemed admitted as evidence at a sentencing proceeding if the trier of fact considering that evidence is the same trier of fact that determined the defendant's guilt. The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the sentencing proceeding and shall be given fair opportunity to present argument as to whether the information is sufficient to establish the existence of any of the circumstances included in subsections F and G of this section.

E. In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. The trier of fact shall consider the following aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant was previously convicted of a serious offense, whether preparatory or completed.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, that were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

G. The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
5. The defendant's age.

H. For the purposes of this section,
"serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:
1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.

APPENDIX B

AZ ST § 13-703.01
A.R.S. § 13-703.01

ARIZONA REVISED STATUTES ANNOTATED
TITLE 13. CRIMINAL CODE
CHAPTER 7. IMPRISONMENT

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Current through End of the Forty-Fifth Legislature,
Second Regular and Fifth Special Sessions (2002)

§ 13-703.01. Sentences of death or life imprisonment; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death. If the state has not filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under § **13-703,** subsection F.

C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.

E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.

F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under § **13-703,** subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.

G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to

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impose a sentence of life or natural life.

I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.

J. At the aggravation phase, iF the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.

N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.

P. The trier of fact shall make all factual determinations required by this section or the constitution of the United States or this state to impose a death sentence.

Q. Subject to the provisions of § 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.

R. For the purposes of this section:

1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.

2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.

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APPENDIX C

26 P.3d 1136
(Cite as: 200 Ariz. 365, 26 P.3d 1136)

Supreme Court of Arizona.

STATE of Arizona, Appellee,
v.
Darrel Peter **PANDELI**, aka Darrel Peter Florian, Appellant.

No. CR 98-0376-AP.

July 17, 2001.

Defendant was convicted in Superior Court, Maricopa County, No. CR-98-0376- AP, Gregory H. Martin, J., of first degree murder, and sentenced to death. Defendant appealed. The Supreme Court, Jones, Vice C.J., held that: (1) defendant was not entitled to offer his confession as a statement against interest without taking the stand to testify; (2) trial court was warranted in omitting instruction on manslaughter; (3) victim's murder was committed in an especially heinous, cruel or depraved manner; (4) defendant failed to establish that he was incapable of appreciating wrongfulness of his conduct, or that he could not conform his conduct to requirements of law; and (5) mitigating factors failed to provide sufficient reason to call for leniency.

Affirmed.

West Headnotes

[1] **Criminal Law** ⇐**1153(1)**
110k1153(1) Most Cited Cases

Supreme Court reviews a trial judge's refusal to admit defendant's confession for abuse of discretion; decisions to exclude such evidence remain within the sound discretion of the trial court and will be reversed on appeal only upon a showing of clear, prejudicial abuse, such that the prejudice was sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed.

[2] **Criminal Law** ⇐**417(15)**
110k417(15) Most Cited Cases

To admit statement against declarant's interest offered to exculpate accused, (1) the declarant must be unavailable, (2) the statement must be against the declarant's interest, and (3) there must be corroborating evidence that indicates the statement's trustworthiness; all three requirements must be satisfied. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

[3] **Criminal Law** ⇐**417(15)**
110k417(15) Most Cited Cases

If a non-defendant declarant asserts the Fifth Amendment privilege against self-incrimination, he is deemed unavailable as a witness for purposes of statement against interest exception to hearsay rule. U.S.C.A. Const.Amend. 5.

[4] **Criminal Law** ⇐**517(7)**
110k517(7) Most Cited Cases

Murder defendant was not entitled to offer his confession as a statement against interest without taking the stand to testify; defendant was not "unavailable" as contemplated by rule governing evidence of statement against interest, since

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defendant had ability to compel himself to testify, but chose, instead, to avoid cross-examination by asserting Fifth Amendment privilege against self-incrimination. U.S.C.A. Const.Amend. 5; 17A A.R.S. Rules of Evid., Rule 804(b)(3).

[5] **Criminal Law** ⇐**517(7)**
110k517(7) Most Cited Cases

When a defendant proffers his own confession for exculpatory purposes, the statement constitutes inadmissible hearsay not in compliance with Rule governing admission of statements against interest. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

[6] **Criminal Law** ⇐**419(2.20)**
110k419(2.20) Most Cited Cases

Murder defendant's statement that he felt angered and threatened by the victim failed to qualify as present state of mind evidence as exception to hearsay rule, given that the statement was given to police two days after the murder, and it described nothing more than asserted memory of past events, rather than present feeling or future intent. 17A A.R.S. Rules of Evid., Rule 803(3).

[7] **Criminal Law** ⇐**1173.3**
110k1173.3 Most Cited Cases
(Formerly 203k341)

By convicting defendant of first-degree murder and ignoring lesser-included offenses of second-degree murder, jury necessarily rejected all lesser-included crimes, and thus, trial court was warranted in omitting instruction on manslaughter, and any error was harmless.

[8] **Sentencing and Punishment** ⇐**1788(5)**
350Hk1788(5) Most Cited Cases

Independent review by the Supreme Court of aggravation and mitigation findings of the trial court ensures that a death penalty is not imposed arbitrarily, is reserved for exceptional cases which satisfy statutory aggravation standards, and is the appropriate sanction for the crime in question.

[9] **Sentencing and Punishment** ⇐**1788(5)**
350Hk1788(5) Most Cited Cases

The Supreme Court will review the record in a capital murder case to determine the presence or absence of aggravating and mitigating circumstances, as well as the weight to be accorded each circumstance.

[10] **Sentencing and Punishment** ⇐**1771**
350Hk1771 Most Cited Cases

Aggravating circumstances must be proven beyond a reasonable doubt in order to support imposition of the death sentence, although both statutory and non- statutory mitigating circumstances may be proven by a preponderance of the evidence.

[11] **Sentencing and Punishment** ⇐**1788(5)**
350Hk1788(5) Most Cited Cases

When mitigation evidence on independent review by the Supreme Court of a death sentence is conflicting and entails considerations of credibility, the Court will accord deference to the trial court's conclusions, but will be independently responsible for weighing all factors to determine ultimately whether proven mitigating circumstances, measured separately or cumulatively, are sufficient to outweigh aggravating circumstances established on the record.

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[12] **Sentencing and Punishment** ⚿1756
350Hk1756 Most Cited Cases

[12] **Sentencing and Punishment** ⚿1757
350Hk1757 Most Cited Cases

Rules of evidence governing admissibility differ as between aggravating and mitigating circumstances in determination of whether death sentence will be imposed; information relevant to any mitigating circumstances may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, however, the admissibility of information relevant to any aggravating circumstance shall be governed by the rules of evidence. A.R.S. § 13-703, subd. C (2000).

[13] **Sentencing and Punishment** ⚿1652
350Hk1652 Most Cited Cases

A court cannot impose death penalty unless it finds that the State has proved at least one aggravating factor. A.R.S. § 13-703, subd. F (2000).

[14] **Sentencing and Punishment** ⚿1705
350Hk1705 Most Cited Cases

[14] **Sentencing and Punishment** ⚿1771
350Hk1771 Most Cited Cases

Aggravating circumstance consisting of a previous conviction of a serious offense was established beyond a reasonable doubt at defendant's sentencing hearing for first-degree murder, where state presented unchallenged, second- degree murder conviction of defendant. A.R.S. § 13-703, subd. F, par. 2 (2000).

[15] **Sentencing and Punishment** ⚿1633
350Hk1633 Most Cited Cases

Date of the crime for which a death sentence was given is the date used to evaluate whether the new version of statute governing aggravating circumstance of previous conviction of a serious offense applies. A.R.S. § 13-703, subd. F, par. 2 (2000).

[16] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

To find that a murder fits within statutory aggravating circumstance as especially heinous, cruel or depraved, so as to warrant death senterce, the State must prove that the crime was committed in a manner that places it above the norm for first degree murder, and because the statute is worded in the disjunctive, any one of three elements--heinousness, cruelty, or depravity--is independently sufficient. A.R.S. § 13-703, subd. F, par. 6 (2000).

[17] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

For purposes of applying statute governing aggravating circumstance for murder committed in an especially heinous, cruel or depraved manner, so as to warrant death sentence, unlike cruelty, which focuses on a victim's mental suffering and physical pain, heinousness and depravity pertain to the killer's state of mind during and immediately following the murder, as evidenced by his words or conduct. A.R.S. § 13-703, subd. F, par. 6 (2000).

[18] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

Maiming a victim beyond the point necessary to fulfill a defendant's criminal purpose, or beyond the point necessary

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to kill, constitutes gratuitous violence so as to establish heinousness and depravity aggravating circumstance warranting death penalty.

[19] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

Evidence that defendant attempted to strangulate victim, and that he struck her with enough blows to fracture her sternum, far exceeded that necessary to show that defendant merely intended to retrieve money paid to victim or to take her life, which was accomplished with a single knife slash to the throat, thus, showing that defendant acted with gratuitous violence, and supporting finding of heinousness and depravity as aggravating circumstance warranting death penalty. A.R.S. § 13-703, subd. F, par. 6 (2000).

[20] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

"Mutilation" as an element of heinousness and depravity is an act distinct from the killing itself that includes the purposeful severing of body parts. A.R.S. § 13-703, subd. F, par. 6 (2000).

[21] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

A finding of mutilation requires some demonstration that the defendant acted with a separate purpose to mutilate the corpse.

[22] **Sentencing and Punishment** ⇐1684
350Hk1684 Most Cited Cases

Evidence that defendant excised parts of both breasts after the death due to anger was sufficient to show that defendant mutilated the victim, so as to support finding of heinousness and depravity as aggravating circumstance warranting death penalty. A.R.S. § 13-703, subd. F, par. 6 (2000).

[23] **Sentencing and Punishment** ⇐1788(5)
350Hk1788(5) Most Cited Cases

On review of a death sentence, the Supreme Court will assess both statutory and non-statutory mitigating factors; the former includes significant mental impairment, while the latter, includes any facet of defendant's character, propensities or record, and any other circumstances of the offense.

[24] **Sentencing and Punishment** ⇐1757
350Hk1757 Most Cited Cases

The purpose of mitigation evidence is to permit the court to determine whether a sentence less severe than death is appropriate; if evidence of mitigation fails to meet the relevant statutory standard, the court must then consider whether it may constitute non-statutory mitigation.

[25] **Sentencing and Punishment** ⇐1658
350Hk1658 Most Cited Cases

[25] **Sentencing and Punishment** ⇐1757
350Hk1757 Most Cited Cases

Although the court in capital murder case must consider all relevant evidence offered in mitigation at sentencing, not all proffered evidence must be found by the court to be mitigating, and even if mitigating, such evidence may deserve no more than slight or nominal weight.

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[26] **Sentencing and Punishment** ⚿1661
350Hk1661 Most Cited Cases

[26] **Sentencing and Punishment** ⚿1771
350Hk1771 Most Cited Cases

The existence of mitigating circumstances is subject to a preponderance of the evidence standard; the court has discretion to determine how much weight, if any, to give each factor.

[27] **Sentencing and Punishment** ⚿1709
350Hk1709 Most Cited Cases

To qualify for a finding of significant impairment to establish statutory mitigating circumstance at sentencing in a capital murder case, a defendant must demonstrate that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired; proof of incapacity as to either component will establish mitigation.

[28] **Sentencing and Punishment** ⚿1709
350Hk1709 Most Cited Cases

A diagnosed mental illness may establish a mitigating sentencing factor of incapacity to appreciate wrongfulness of conduct, or to conform his conduct to the requirements of law, in capital case. A.R.S. § 13-703, subd. G, par. 1 (2000).

[29] **Sentencing and Punishment** ⚿1772
350Hk1772 Most Cited Cases

In determining the existence of significant impairment mitigation in capital murder case, the trial judge has broad discretion in evaluating the weight and credibility of expert mental health evidence. A.R.S. § 13-703, subd. G, par. 1 (2000).

[30] **Sentencing and Punishment** ⚿1789(8)
350Hk1789(8) Most Cited Cases

When mitigation evidence in capital murder case conflicts and entails considerations of credibility, Supreme Court will give substantial deference to the trial court's determinations. A.R.S. § 13-703, subd. G, par. 1 (2000).

[31] **Sentencing and Punishment** ⚿1709
350Hk1709 Most Cited Cases

Capital murder defendant failed to establish at sentencing that he was incapable of appreciating wrongfulness of his conduct, or that he could not conform his conduct to requirements of law, so as to establish statutory mitigating circumstance of a significant impairment; although defendant's mental health expert concluded that defendant suffered from paranoid schizophrenia and post traumatic stress disorder (PTSD), state's psychological expert rejected those diagnoses, in part, because defendant maintained an active social life and exhibited ability to interact with others and, at most, exhibited traits of a person with an antisocial personality disorder, while defendant's initial denial of his involvement in the crime and attempt to eliminate evidence showed his understanding of the wrongfulness of his actions. A.R.S. § 13-703, subd. G, par. 1 (2000).

[32] **Sentencing and Punishment** ⚿1788(5)
350Hk1788(5) Most Cited Cases

Even if a psychological disorder does not rise to the level of mental disease or defect originally contemplated as a statutory mitigating circumstance in capital murder case, the Supreme Court will continue to assess the evidence to determine whether non-statutory mitigation may be sufficient to warrant a reduction in sentence, and will also determine whether the required causal nexus exists between any mental or personality disorder and the defendant's

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criminal acts.

[33] **Sentencing and Punishment** ⊂⊃**1788(5)**
350Hk1788(5) Most Cited Cases

Supreme Court's primary task when assessing evidence of mental disorder in capital murder case is to determine its mitigating weight.

[34] **Sentencing and Punishment** ⊂⊃**1709**
350Hk1709 Most Cited Cases

A nexus is established by evidence, testimonial or otherwise, connecting defendant's mental or personality disorder with his capital crime.

[35] **Sentencing and Punishment** ⊂⊃**1709**
350Hk1709 Most Cited Cases

Evidence, though conflicting, was insufficient to find a nexus between defendant's personality disorder, as a non-statutory mitigating circumstance, and crime of capital murder, where state's psychological expert rejected defendant's expert's diagnosis and opinion of causal link, stating unequivocally that the defendant was neither experiencing paranoid delusions, nor was schizophrenia or any other mental disorder a factor which caused the crime to occur, but rather, defendant was in control of his actions and fully understood what he was doing.

[36] **Sentencing and Punishment** ⊂⊃**1685**
350Hk1685 Most Cited Cases

When a jury verdict finding defendant guilty beyond a reasonable doubt is supported by very strong evidence, trial court may refuse to find the nonstatutory mitigating circumstance of residual doubt, even where the verdict is grounded in circumstantial evidence.

[37] **Sentencing and Punishment** ⊂⊃**1685**
350Hk1685 Most Cited Cases

No evidentiary basis existed for finding nonstatutory mitigating circumstance of residual doubt in capital murder case, where victim was beaten and strangled before the killing, affording defendant an opportunity to consider what he was doing, and no forensic evidence reflected a struggle between victim and defendant, as defendant had claimed.

[38] **Sentencing and Punishment** ⊂⊃**1718**
350Hk1718 Most Cited Cases

Potential for rehabilitation during a life sentence may constitute a mitigating circumstance in a capital murder case.

[39] **Sentencing and Punishment** ⊂⊃**1718**
350Hk1718 Most Cited Cases

Defendant's potential for permanent rehabilitation, even if mitigating, could be accorded only the slightest weight, given that defendant's incarceration had been spent in administrative segregation where he has had fewer opportunities to interact with others.

[40] **Sentencing and Punishment** ⊂⊃**1721**
350Hk1721 Most Cited Cases

Evidence at sentencing hearing that capital murder defendant had been a model prisoner and had not been involved in difficulties or altercations while in prison and had adjusted to his incarceration was of minimal weight as a nonstatutory mitigating circumstance.

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[41] **Sentencing and Punishment** ⚿1721
350HK1721 Most Cited Cases

Good conduct during pretrial and presentence incarceration may be, but is not always, mitigating at sentencing in capital murder case.

[42] **Sentencing and Punishment** ⚿1721
350HK1721 Most Cited Cases

Uncontradicted evidence at the sentencing hearing establishing that capital murder defendant taught himself to read and write while incarcerated was entitled only to minimal mitigation.

[43] **Sentencing and Punishment** ⚿1715
350HK1715 Most Cited Cases

Evidence offered by capital murder defendant that defendant had contracted hepatitis C, which would shorten his life did not qualify as a nonstatutory mitigating circumstance.

[44] **Sentencing and Punishment** ⚿1704
350HK1704 Most Cited Cases

Fact that prior murder committed by defendant occurred more than a year earlier was not entitled to any weight in mitigation at sentencing for capital murder.

[45] **Sentencing and Punishment** ⚿1719
350HK1719 Most Cited Cases

Capital murder defendant's cooperation with the police through forensic testing did not qualify as a nonstatutory mitigating circumstance, where such cooperation occurred only when defendant believed his guilt was discoverable, after he had already sought to hide or destroy evidence, evade detection, and had denied knowledge of the crime.

[46] **Sentencing and Punishment** ⚿1719
350HK1719 Most Cited Cases

Admission of guilt and cooperation with the police in a capital murder case can be a mitigating circumstance at sentencing.

[47] **Sentencing and Punishment** ⚿1718
350HK1718 Most Cited Cases

Remorse over the killings of defendant's two victims was established as a mitigator, where defendant expressed regret over the pain brought upon victim's families, and defendant's remorse appeared genuine and mitigating.

[48] **Sentencing and Punishment** ⚿1718
350HK1718 Most Cited Cases

Genuine remorse may constitute non-statutory mitigation at sentencing for committing a capital crime.

[49] **Sentencing and Punishment** ⚿1721
350HK1721 Most Cited Cases

Capital murder defendant's religious faith, found after conviction and incarceration, was entitled only to slight mitigating weight.

[50] **Sentencing and Punishment** ⚿1721

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350Hk1721 Most Cited Cases

New-found religious faith may be considered non-statutory mitigation.

[51] **Sentencing and Punishment** ⚿1702
350Hk1702 Most Cited Cases

Capital murder defendant was not entitled to have evidence of general good character considered as a nonstatutory mitigating circumstance, though prior to the two murders, defendant had no trouble with the law, given that the two murders were committed just over one year apart.

[52] **Sentencing and Punishment** ⚿1702
350Hk1702 Most Cited Cases

[52] **Sentencing and Punishment** ⚿1704
350Hk1704 Most Cited Cases

Evidence of no prior crimes, as well as evidence of general good character may be mitigating circumstance in capital murder case.

[53] **Sentencing and Punishment** ⚿58
350Hk58 Most Cited Cases

Aggravating and mitigating circumstances are evaluated both separately and cumulatively by the sentencing court; when at least one aggravator is found and one or more mitigators is established, the Supreme Court must decide whether the mitigation is sufficiently substantial to call for a reduction in sentence.

[54] **Sentencing and Punishment** ⚿1684
350Hk1684 Most Cited Cases

[54] **Sentencing and Punishment** ⚿1700
350Hk1700 Most Cited Cases

Mitigating factors, viewed separately or cumulatively, such as capital murder defendant's potential for rehabilitation, adaption to incarceration, remorse, and religious faith, failed to provide sufficient reason to call for leniency in light of his prior murder of another victim, as well as the especially heinous, cruel or depraved nature of the most recent murder, where defendant attempted to strangle victim, and struck her with enough blows to fracture her sternum, before killing her with a knife, and subsequently mutilating her body. A.R.S. § 13-703, subd. F, pars. 2, 6 (2000).

****1141*370** Janet Napolitano, Attorney General, by Paul J. McMurdie, Criminal Appeals Chief Counsel and Kent E. Cattani, Assistant Attorney General, Phoenix, Attorneys for Appellee.

J. Douglas McVay, Phoenix, Attorney for Appellant.

OPINION

JONES, Vice Chief Justice.

¶ 1 Defendant Darrel Peter Pandeli (defendant) was convicted by a jury of first degree murder and was sentenced to death by the trial judge. The case is before us on direct review, pursuant to Rules 26.15 and 31.2 of the Arizona Rules of Criminal Procedure. We have jurisdiction pursuant to article VI, § 5(3) of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 13-4031 (1989) and 13-703.01 (Supp.1999).

PROCEDURAL HISTORY

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¶ 2 The State charged defendant with two counts of premeditated murder: count one for the murder of Teresa Humphreys and count two for the murder of Holly Iler. Humphreys was murdered more than a year before Iler. The two counts were severed for trial.

¶ 3 In February 1996, a jury convicted defendant of second degree murder for the Humphreys death. The trial court sentenced him to twenty years in prison. Defendant appealed the conviction, and the court of appeals affirmed. This appeal pertains exclusively to the conviction and sentence in the Iler case.

¶ 4 Defendant's trial for the Iler murder commenced in June 1997. At the close of the State's case, defense counsel moved for a directed verdict on premeditated murder, arguing that no evidence of premeditation existed and asking the trial court to allow the jury to consider only second degree murder and its lesser-included offenses. The trial court denied the motion. Defendant did not testify, and defense counsel presented no evidence because defendant did not contest the allegation that he killed Iler. He challenged only the element of premeditation in connection with the murder charge.

¶ 5 The jury, instructed on both first and second degree murder, returned its verdict July 2, 1997, convicting defendant of first degree murder. The sentencing hearing lasted eight days. The trial court heard testimony and argument on all sentencing issues and, on July 15, 1998, handed down its Special Verdict sentencing defendant to death.

FACTS

¶ 6 On September 23, 1993, defendant and his friend, Mark Cowan, went to a bar in Phoenix where they consumed beer. After the bar trip, the two proceeded to a K Mart store where Cowan purchased a shirt. Cowan changed his clothes and left his shirt, shoes, and deodorant in the defendant's van. They then met defendant's brother Chris Pandeli and another friend at a restaurant at the Arizona Center in Phoenix and remained there for several hours. At about 10:15 p.m., Chris and Cowan left for another bar. Defendant stayed at the Arizona Center. At approximately 11:45 p.m., defendant again met Chris and Cowan and asked his brother to give Cowan a ride home. Cowan slept at Chris' apartment that night.

¶ 7 At about 2:00 a.m., defendant's roommate, Louis Russo, arrived home and found defendant cleaning his van and washing his clothing. Defendant had removed the mattress from his van. Russo testified that defendant told him he was cleaning the van because someone spilled a strawberry soda inside and that defendant appeared sober but upset, excited, and stressed.

¶ 8 The next morning, Holly Iler's nude body was found in an alley near the defendant's residence. Among other injuries, her throat had been slashed and the areolae and nipple parts of her breasts excised.

**1142 *371 ¶ 9 The same morning, Cowan asked Chris to take him to defendant's house to retrieve his clothing from the van. They arrived at about 7:30 a.m. and found the defendant outside. Still tired, Cowan asked defendant if he could sleep in the van, and defendant permitted him to do so. After approximately ninety minutes, defendant woke Cowan and told him the police were investigating the death of a woman whose body was found down the street. Cowan drifted back to sleep, but defendant woke him again and asked whether Cowan knew what an RV van marked "Phoenix Mobile Command" would be doing at a crime scene. Cowan told defendant he presumed it was a mobile crime laboratory. Defendant then asked Cowan if the police had the ability to detect tire tracks or identify other types of tracks, and Cowan responded that the police could take impressions and pictures of tracks.

¶ 10 Shortly thereafter, defendant and Cowan left to run errands. When defendant dropped Cowan off at a motel, he gave Cowan his clothing from the van, but the shirt and one sock were missing. After showering at the motel, Cowan noticed red spots on his shoes and deodorant stick that were not present when he left them in defendant's van the night before. Cowan became suspicious that defendant was somehow involved in the death of the woman whose body had been discovered and watched for television reports of the crime. When he saw a report describing the victim, his suspicion heightened because the description resembled a woman with whom defendant had socialized the night before at the Arizona Center. Though it was not the same woman, Cowan thought it might be.

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¶ 11 That evening, the defendant, Cowan, Chris, and two other friends went to several bars. During the evening, Cowan noticed that defendant appeared subdued and quiet, more than was normally the case. Cowan returned to the motel at the end of the evening. The following morning, Cowan's suspicions of defendant's involvement in the woman's death caused him to call Silent Witness, an evidence gathering arm of the Phoenix Police Department. The police came to question Cowan, who surrendered his shoes and deodorant stick to them for testing the red spots. The soles of Cowan's shoes matched prints found near the victim's body in the alley. Additionally, preliminary testing found the red spots on the shoes to be consistent with the victim's blood. Based on these facts, police obtained a search warrant for the defendant's residence and van and took him into custody.

¶ 12 Police detectives questioned defendant after giving him the *Miranda* [FN1] warning. He initially denied involvement in the murder. When questioned about the blood on Cowan's shoes, defendant told detectives that he walked outside early that morning and saw the body. He said he looked at the body and touched and moved it to see if any marks were on the victim's back. Defendant denied killing Iler and attributed the blood on his shoes to the morning contact with her body. He stated that he did not tell anyone about the body because he did not want to be blamed for the death. Defendant admitted removing and taking a ring and other items from the body.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶ 13 A detective explained to the defendant that the police have equipment to detect traces of blood in a van that has been cleaned and on clothing that has been washed. At that point, defendant ceased his denials and stated that he wanted to confess the truth. He told the detective that he offered Iler a ride and she accepted. They stopped at a park near his residence where she agreed to have sexual intercourse in exchange for twenty dollars. He used a condom and attempted intercourse, but was unable to perform. He stopped trying and asked her to return his money.

¶ 14 Defendant claimed that Iler then became upset and pulled a knife. They struggled. He hit her in the chest four or five times and in the head three or four times, then slit her throat with a knife. After the killing, he amputated parts of her breasts, dumped the body in the alley, and placed her clothing in a nearby garbage container; he then returned to his residence and cleaned the van. Defendant admitted mutilating **1143 *372 Iler's breasts after she was dead. He said he did it because he was angry. He first claimed to have thrown the excised breast parts into the garbage container, but later confessed to flushing them through the toilet in his residence. After confessing the Iler murder, defendant also confessed to having committed the earlier murder of Teresa Humphreys.

¶ 15 Police searched defendant's residence and van and located a Swiss Army knife, keys, a blood-stained rope, and a "fanny pack" purse that belonged to Iler. Police also obtained from a nearby garbage container, identified by the defendant, bedding, a T-shirt, a sock, and a condom.

¶ 16 Prior to trial, the State moved *in limine*, pursuant to Rule 404(b), Arizona Rules of Evidence, to admit portions of defendant's confession, including parts relating to Humphreys' killing. The trial court denied the motion, ruling that evidence pertaining to Humphreys' murder was inadmissible. Consequently, the State determined not to use any of defendant's confession in its case-in-chief, indicating during a bench conference that no part of the confession would be offered because the prosecution did not wish "to open the door" to some exculpatory statements.

¶ 17 Defense counsel filed a trial memorandum requesting that the court rule defendant's entire confession admissible as hearsay exceptions under Rules 803(3) and 804(b)(3), Arizona Rules of Evidence. The State objected. The trial court sustained the State's objection and excluded the confession.

DISCUSSION

I. TRIAL ISSUES

A. ADMISSIBILITY OF DEFENDANT'S CONFESSION

III ¶ 18 We review the trial judge's refusal to admit defendant's confession for abuse of discretion. *State v. Lavers*

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Walters, 153 Ariz. 21, 27, 734 P.2d 563, 569 (1987). Decisions to exclude such evidence remain within the sound discretion of the trial court and will be reversed on appeal only upon a showing of clear, prejudicial abuse. State v. Ivala, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App.1994). "The prejudice must be sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed." Id.

¶ 19 The statement, offered by the defendant to exculpate, was an out- of-court declaration and was thus inadmissible hearsay unless it fits within a recognized exception to the rule. Ariz.R.Evid. 804(c). This court has previously noted that the trustworthiness of a defendant's self-serving out-of- court statement was "highly suspect." State v. Smith (Robert), 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983). Defendant advanced two possible hearsay exceptions which we address in turn.

1. RULE 804-Statement Against Interest

¶ 20 Rule 804(b)(3) reads:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(3) *Statement against interest*.... A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. (Emphasis added.)

[2][3] ¶ 21 The rule sets forth three requirements for admissibility: (1) the declarant must be unavailable; (2) the statement must be against the declarant's interest; and (3) there must be corroborating evidence that indicates the statement's trustworthiness. All three must be satisfied. State v. Henry, 176 Ariz. 569, 575, 863 P.2d 861, 867 (1993); *see also* LaGrand, 153 Ariz. at 27, 734 P.2d at 569. [FN2] If a non-defendant declarant asserts **1144 *373 the Fifth Amendment privilege against self- incrimination, he is deemed unavailable as a witness. *See* State v. Lopez, 159 Ariz. 52, 54, 764 P.2d 1111, 1113 (1988) (defendant successfully sought admission of roommate's statements pursuant to Rule 804(b)(3) after roommate asserted Fifth Amendment privilege).

FN2. The State correctly asserts that the "*LaGrand* test" should apply only to cases in which someone other than the defendant is the declarant because a defendant's "self-serving" statements are always "highly suspect." The express wording of the rule is consistent with this argument since it refers with particularity to any statement which tends to "expose the declarant" and at the same time "exculpate[s] the accused...." Under this wording, the declarant must be one person and the accused another. Where the declarant and the accused are one and the same, the admissibility requirements of Rule 804(b)(3) are not met.

[4] ¶ 22 Here, the defendant *is* the declarant seeking admission of his own statements to police without taking the stand to testify. The State contends the defendant cannot refuse to testify and yet offer his own hearsay statements for the record. "When offered by the defendant, his out-of-court declarations are not subject to cross-examination by the prosecution. Therefore, such statements are appropriately inadmissible unless offered, not to prove the truth of their content," but for some other admissible purpose. King v. Commonwealth, 18 Va.App. 57, 441 S.E.2d 704, 705 (1994) (finding reliability of out-of-court statement as "the principal rationale underlying the hearsay rule").

[5] ¶ 23 "Unavailability" means that the party seeking admission of the statement cannot compel the declarant to testify. Defendant is not "unavailable" to himself and has the ability and the right to testify. Should he decline by asserting his Fifth Amendment privilege, he may not then seek to introduce his statement to police yet at the same time avoid cross-examination under oath and impeachment. The trial court correctly ruled that when a defendant proffers his own confession for exculpatory purposes, the statement constitutes inadmissible hearsay not in compliance with Rule 804(b)(3).

2. RULE 803-State of Mind

[6] ¶ 24 For a hearsay statement to be admissible under the Rule 803(3) exception, it must be "[a] statement of the

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declarant's *then existing* state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Ariz. R. Evid. 803(3) (emphasis added). Defendant's statement to police two days *after* the crime, that he felt threatened by the victim, fails to qualify as present "state of mind" under this hearsay exception because the statement described a *prior* mental state, not a present mindset. *State v. Barger*, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App. 1990) (emphasis added).

¶ 25 In *State v. Fulminante*, this court held that "the statement must describe declarant's present feeling or future intention rather than look backward, describing declarant's past memory or belief about another's conduct." *Id.*, 193 Ariz. 485, 495, 975 P.2d 75, 85 ¶ 32 (1999). The statement must be directed solely at the declarant's present state of mind, rather than constitute a narrative of prior factual events that created an earlier state of mind. *Id.*

¶ 26 Defendant's statements that he and the victim disrobed in the back of the van, that he became angry when he could not perform sexually and the victim refused to return the money, that she pulled a knife and defendant took it from her, and that he excised breast parts because of his anger described neither present feeling nor future intent. The statements contain nothing more than asserted memory of past events and fail to meet the requirements of Rule 803(3). The trial court did not abuse its discretion in excluding the confession as inadmissible hearsay pursuant to Arizona Rule of Evidence 801(c).

B. REFUSAL TO GRANT THE MANSLAUGHTER INSTRUCTION

17 ¶ 27 Defendant claims the jury should have been instructed on the lesser-included offense of manslaughter. The court must instruct the jury on every lesser-included offense to the offense charged, provided that the evidence supports the instruction. *State v. Amaya-Ruiz*, 166 Ariz. 152, 174, 800 P.2d 1260, 1282 (1990). The trial court in *Amaya-Ruiz* instructed the jury, as here, on first and second degree murder but, in the absence of supporting evidence, refused to give the requested manslaughter instruction. We **1145 *374 held that when the court gives the jury proper first and second degree murder instructions, but refuses manslaughter, and the defendant is convicted of first degree rather than second degree murder, any error is harmless. *Id.* The jury, by implication, has rejected all lesser-included crimes. *See id.* (citing *State v. Ortiz*, 158 Ariz. 528, 764 P.2d 13 (1988)); *see also State v. Tickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989) (any error in failing to give manslaughter instruction cured by first degree murder conviction while rejecting second degree); *State v. White*, 144 Ariz. 245, 247, 697 P.2d 328, 330 (1985) ("[F]inding defendant guilty of the highest offense, to the exclusion of the immediately lesser- included offense, second degree murder, the jury necessarily rejected all other lesser-included offenses."). In the instant case, any error was harmless.

II. SENTENCING ISSUES

18 19 ¶ 28 In determining the appropriateness of a death sentence, we independently review the aggravation and mitigation findings of the trial court. A.R.S. § 13-703.01(A) (2001); *see, e.g.*, *State v. Kayer*, 194 Ariz. 423, 432-33, 984 P.2d 31, 40-41 ¶ 28 (1999). Independent review by this court ensures that the death penalty is not imposed arbitrarily, is reserved for exceptional cases which satisfy statutory aggravation standards, and is the appropriate sanction for the crime in question. *State v. Bible*, 175 Ariz. 549, 606, 858 P.2d 1152, 1209 (1993). The court reviews the record to determine the presence or absence of aggravating and mitigating circumstances, as well as the weight to be accorded each circumstance. *State v. Bolton*, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995) (presence or absence of factors); *State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (weight given to factors).

110 111 ¶ 29 Aggravating circumstances must be proven beyond a reasonable doubt. *Kayer*, 194 Ariz. at 433, 984 P.2d at 41 ¶ 28 (citing *State v. Brewer*, 170 Ariz. 486, 500, 826 P.2d 783, 797 (1992)). Both statutory and non-statutory mitigating circumstances may be proven by a preponderance of the evidence. *State v. Djerf*, 191 Ariz. 583, 595, 959 P.2d 1274, 1286 ¶ 39 (1998) (citing *Brewer*, 170 Ariz. at 504, 826 P.2d at 801). When mitigation evidence is conflicting and entails considerations of credibility, we accord deference to the trial court's conclusions. *State v. Hoskins*, 199 Ariz. 127, 149, 14 P.3d 997, 1019 ¶ 97 (2000) (citing *State v. Valike*, 177 Ariz. 118, 128, 865 P.2d 779, 789 (1993)). But we are independently responsible for weighing all factors to determine ultimately whether proven mitigating circumstances, measured separately or cumulatively, are sufficient to outweigh aggravating circumstances established on the record. *Kayer*, 194 Ariz. at 433, 984 P.2d at 41 ¶ 28.

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[12] ¶ 30 The rules of evidence governing admissibility differ as between aggravating and mitigating circumstances. "[I]nformation relevant to any mitigating circumstances ... may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials...." A.R.S. § 13-703(C) (2001). However, "the admissibility of information relevant to any ... aggravating circumstance ... shall be governed by the rules of evidence." *Id.*

A. AGGRAVATING FACTORS

[13] ¶ 31 A court cannot impose the death penalty unless it finds that the State has proved at least one aggravating factor under A.R.S. § 13-703(F). *State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). At trial, the State advanced two: (1) previous conviction of a serious crime, A.R.S. § 13-703(F)(2); and (2) the murder was especially heinous, cruel, or depraved, A.R.S. § 13-703(F)(6). The trial court found each factor beyond a reasonable doubt.

1. A.R.S. § 13-703(F)(2): Previous Conviction of a Serious Offense

[14][15] ¶ 32 The legislature amended the (F)(2) aggravating factor, effective April 1993. The date of the crime for which the death sentence was given is the date used to evaluate whether the new version applies. Because the Iler murder occurred in September 1993, the amended version of (F)(2) is applicable. *Kayer*, 194 Ariz. at 433, 984 P.2d at 41 ¶ 30; **1146*375 *State v. Rienhardt*, 190 Ariz. 579, 589, 951 P.2d 454, 464 (1997). Amended § 13-703(F)(2) reads: Aggravation is established where "[t]he defendant was previously convicted of a serious offense, whether preparatory or completed." Second degree murder is a "serious offense." A.R.S. § 13-703(H)(1)(b) (2001).

¶ 33 Defendant was convicted of second degree murder in the killing of Teresa Humphreys. The conviction qualifies under the statute as a previous conviction of a serious offense. The State established at sentencing that the defendant committed second degree murder, and the defendant does not challenge this finding. We therefore hold the (F)(2) aggravating circumstance was established beyond a reasonable doubt.

2. A.R.S. § 13-703(F)(6): Especially Heinous, Cruel or Depraved

[16] ¶ 34 Section 13-703(F)(6) reads: "The defendant committed the offense in an especially heinous, cruel or depraved manner." To find that a murder fits within this provision, the State must prove that the crime was committed in a manner that places it above the norm for first degree murder. *State v. Gretzler*, 135 Ariz. 42, 53, 659 P.2d 1, 12 (1983). Because the statute is worded in the disjunctive, any one of three elements--heinousness, cruelty, or depravity--is independently sufficient. *State v. Medina*, 193 Ariz. 504, 513, 975 P.2d 94, 103 ¶ 33 (1999).

¶ 35 The State alleged that all three elements of (F)(6) had been established. The trial court did not find especial cruelty because of the absence of defensive wounds or other evidence of consciousness of the victim.

[17] ¶ 36 Unlike cruelty, which focuses on the victim's mental suffering and physical pain, heinousness and depravity pertain to the killer's state of mind during and immediately following the murder, as evidenced by his words or conduct. *Medina*, 193 Ariz. at 513, 975 P.2d at 103 ¶ 35. This court has previously defined depraved as "marked by debasement, corruption, perversion or deterioration," and heinous as "hatefully or shockingly evil; grossly bad." *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10 (citing *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977)).

a. Gratuitous Violence

[18] ¶ 37 The trial court concluded both heinousness and depravity were proven beyond a reasonable doubt by evidence of defendant's gratuitous violence. We agree. Maiming a victim beyond the point necessary to fulfill a defendant's criminal purpose, *see* *State v. Ceja*, 126 Ariz. 35, 40, 612 P.2d 491, 496 (1980), or beyond the point necessary to kill, constitutes gratuitous violence. *Rienhardt*, 190 Ariz. at 590, 951 P.2d at 465. Accordingly, this court has held that bruises to a victim's legs and arms, scraping and cutting injuries to the neck, chest, and breast, a head wound, strangulation, and two deep slashes to the throat demonstrate a defendant's "attempt to inflict unnecessary and gratuitous violence beyond that required to kill" the victim. *State v. Walden*, 183 Ariz. 595, 619, 905 P.2d 974, 998 (1995).

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[19] ¶ 38 Here, the cause of death was a single, deep knife slash to the victim's throat. Yet, forensic evidence established that defendant also struck the victim on the head several times and delivered enough blows to her chest to fracture the sternum. In addition, petechial hemorrhages in the victim's eyes and a ligature mark around her neck demonstrated an attempt at strangulation prior to her death. Defendant contends that because these injuries occurred prior to death, they evince nothing more than a struggle between the victim and defendant and demonstrate that all such injuries were necessary to kill. This claim, however, is at odds with the physical evidence.

¶ 39 Forensic evidence established that these were not defensive wounds and that a struggle, as claimed by the defendant, was not likely to have occurred. Whether his objective was merely to retrieve money previously paid or actually to take the victim's life, the violence to her body far exceeded that necessary to accomplish either goal. Gratuitous violence was established beyond a reasonable doubt. This finding alone is sufficient to constitute the (F)(6) aggravating circumstance.

b. Mutilation

[20][21] ¶ 40 Mutilation, also a form of heinousness and depravity, "is an act distinct ****1147 *376** from the killing itself that includes the purposeful severing of body parts." *State v. Doerr*, 193 Ariz. 56, 68, 969 P.2d 1168, 1180 ¶ 55 (1998). A finding of mutilation requires some demonstration that the defendant acted with a "separate purpose to mutilate the corpse." *State v. Richmond (III)*, 180 Ariz. 573, 580, 886 P.2d 1329, 1336 (1994). In *Doerr*, this court held that defendant's amputation of part of the victim's left breast and the attempted removal of parts of the right breast established mutilation. 193 Ariz. at 68, 969 P.2d at 1180 ¶ 55.

[22] ¶ 41 The defendant here admittedly excised parts of both breasts *after* the death. This constitutes body mutilation. Because he claims these actions were done in anger, the defendant himself separated his motivation to kill from his motivation to mutilate. The evidence is sufficient to prove the (F)(6) factor beyond a reasonable doubt. Moreover, the defendant concedes in the opening brief that his acts of mutilation establish the (F)(6) factor.

B. MITIGATING FACTORS

¶ 42 The mitigation statute reads in pertinent part:

> The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
>
> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

A.R.S. § 13-703(G)(1) (2001).

[23][24][25] ¶ 43 We assess both statutory and non-statutory mitigating factors. The former includes significant mental impairment, urged by the defendant. The latter, also urged by the defendant, includes any facet of defendant's character, propensities or record, and any other circumstances of the offense. The purpose of mitigation evidence is to permit the court to determine whether a sentence less severe than death is appropriate. *See* *State v. Gulbrandson*, 184 Ariz. 46, 69, 906 P.2d 579, 602 (1995); *State v. Gonzales*, 181 Ariz. 502, 514, 892 P.2d 838, 850 (1995); *State v. Wood*, 180 Ariz. 53, 70, 881 P.2d 1158, 1175 (1994). If evidence of mitigation fails to meet the relevant statutory standard, the court must then consider whether it may constitute non-statutory mitigation. *State v. Gallegos (I)*, 178 Ariz. 1, 22, 870 P.2d 1097, 1118 (1994). Although the court must consider all relevant evidence offered in mitigation, not all proffered evidence must be found by the court to be mitigating, and even if mitigating, such evidence may deserve no more than slight or nominal weight. *State v. Murray*, 184 Ariz. 9, 38, 906 P.2d 542, 571 (1995); *Gonzales*, 181 Ariz. at 515, 892 P.2d at 851 (court required to do no more than consider all evidence offered in mitigation).

[26] ¶ 44 The existence of mitigating circumstances is subject to a preponderance of the evidence standard. *State v. Dickens*, 187 Ariz. 1, 24, 926 P.2d 468, 491 (1996); *State v. Laird*, 186 Ariz. 203, 207-08, 920 P.2d 769, 773-74 (1996). The court has discretion to determine how much weight, if any, to give each factor. *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996); *State v. Jones*, 185 Ariz. 471, 489, 917 P.2d 200, 218 (1996).

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¶ 45 At sentencing, the trial court concluded that defendant's mitigation evidence failed to outweigh the two aggravating factors associated with Iler's murder. Such evidence was thus not sufficiently substantial to call for leniency, and defendant challenges these findings.

1. STATUTORY MITIGATION

a. Significant Impairment--A.R.S. § 13-703(G)(1)

[27] ¶ 46 To qualify for a finding of (G)(1) significant impairment, a defendant must demonstrate that his "capacity to appreciate the wrongfulness of his conduct *or* to conform his conduct to the requirements of law was significantly impaired." *Kayer*, 194 Ariz. at 437, 984 P.2d at 45 ¶ 48 (quoting ****1148 *377** A.R.S. § 13-703(G)(1) (emphasis added)). Because this factor is phrased disjunctively, proof of incapacity as to either component will establish mitigation. *Murray*, 184 Ariz. at 40-41, 906 P.2d at 573-74.

[28] ¶ 47 A diagnosed mental illness may establish the (G)(1) factor. *See Kayer*, 194 Ariz. at 437, 984 P.2d at 45 ¶ 49.

[29][30] ¶ 48 In determining the existence of (G)(1) mitigation, the trial judge has broad discretion in evaluating the weight and credibility of expert mental health evidence. *Doerr*, 193 Ariz. at 69, 969 P.2d at 1181 ¶ 64; *State v. McKinney (II)*, 185 Ariz. 567, 579, 917 P.2d 1214, 1226 (1996). When mitigation evidence conflicts and entails considerations of credibility, we give substantial deference to the trial court's determinations. *See Hoskins*, 199 Ariz. at 149, 14 P.3d at 1019 ¶ 97 (citing *Milke* at 128, 865 P.2d at 789).

[31] ¶ 49 The trial court heard testimony from psychiatric experts for the defendant and the State, as well as from mitigation investigators Mary Duran and Nora Shaw. Defendant's expert, Donald F. Stonefeld, M.D., diagnosed the defendant as suffering from paranoid schizophrenia both prior to and at the time of the killing. He testified that the defendant also suffered from post traumatic stress disorder (PTSD). According to Stonefeld, defendant's Minnesota Multiphasic Personality Inventory (MMPI) test results suggested serious psychopathology with a possible indication of psychotic symptoms and behavior.

¶ 50 Defendant's family has a history of mental health problems. Moreover, he may have had disordered thought processes in early childhood and suffered from lack of judgment and perspective. Stonefeld testified that defendant's mental illness precludes him from normal perceptions of reality. Additionally, at the time of the killing, defendant had used drugs and alcohol that exacerbated his mental deficiency. His drug use began at age eight.

¶ 51 Stonefeld opined that defendant's home environment caused confusion as to his sexuality and sexual identity because his mother frequently switched sexual partners and preferences. Defendant's sexual identity was further confused by several occasions of sexual abuse, both by men and women during childhood. Defendant's history of sexual abuse was corroborated by his brother. Defendant's mother also suffered depression and low self-esteem and exhibited self-absorbed and neglectful behavior patterns toward defendant and his siblings. Defendant claims to have hallucinated during the killing and maintains that his enraged conduct resulted from the fear of either sexual inability or possible homosexuality.

¶ 52 Defendant was first sexually abused between the ages of four and five. At nine or ten years, he was sodomized. Two occasions of sexual molestation during his childhood were perpetrated by adult women. Again at age fifteen, defendant was sodomized several times. All incidents of sexual abuse were perpetrated by strangers or acquaintances, not by family members. By the age of sixteen, defendant supported himself financially by "hustling" on the streets.

¶ 53 Defendant's father was absent and his mother was neglectful, which generated a pattern of thinking by defendant that he could act without consequence. He acted in an unruly manner as a young child and was placed on Ritalin between the ages of five and six for behavioral problems, but he received no further treatment for these difficulties. He attempted suicide several times, including once at age ten. Defendant was placed in special education classes due to his mental health and disabilities.

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¶ 54 Stonefeld further opined that the circumstances of the killing demonstrated a lack of control. Defendant perceived his victim as a threat in this sexual situation and, because of his paranoia, believed he was in danger.

¶ 55 Based on this evidence, Stonefeld concluded that defendant's paranoid schizophrenia would have substantially impaired his capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. Stonefeld further concluded that symptoms of the impairment had been apparent since childhood.

¶ 56 The trial court also heard testimony from the State's psychological expert, Michael *378 **1149 Brad Bayless, Ph.D., who contradicted Stonefeld's diagnosis and opinions. Bayless opined that "Pandeli was fully aware of his behavior at the time of the offense. He was able to appreciate the wrongfulness of his conduct, and clearly understood the nature and quality of his act." Bayless based this opinion on proof that defendant initially denied involvement in the crime and attempted to eliminate evidence by cleaning his van, washing clothing, and discarding items because he understood the wrongfulness of his actions.

¶ 57 Bayless rejected the diagnosis of paranoid schizophrenia because he disagreed with Stonefeld's interpretation of defendant's MMPI and because, in his opinion, defendant did not meet all of the applicable criteria listed in The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (4th ed.1994), the "bible" of psychological diagnosis. According to Bayless, paranoid schizophrenia is fully incompatible with someone like Pandeli who maintains an active social life and exhibits the ability to interact and make eye contact with others.

¶ 58 Bayless further rejected Stonefeld's diagnosis of PTSD, citing the absence of sufficient indicia. He testified that PTSD is not an "on and off" phenomenon but rather a condition which would grow more prominent if untreated. Bayless testified that he observed no evidence of the disorder. Instead, Bayless indicated that defendant exhibited certain traits of narcissistic and anti-social personality disorder, but Bayless stopped short of diagnosing anti-social personality disorder because defendant failed to exhibit all the appropriate criteria.

¶ 59 The trial court evaluated the competing mental health evidence, as well as all other (G)(1) evidence presented, including the facts of the crime and the defendant's confession. The court stated in its Special Verdict:

> Dr. Bayless, without hesitation and unequivocally, dismissed Dr. Stonefeld's opinion. He said that the Defendant was not a paranoid schizophrenic nor was he suffering from post traumatic stress disorder. In Dr. Bayless' view this Defendant exhibits many of the traits of a person who suffers from an antisocial personality disorder--but nothing more.

Special Verdict at 4. Ultimately, the court determined by a preponderance of the evidence that the mental illnesses or disorders, testified to by Stonefeld, did not exist. Additionally, the trial court relied on defendant's attempt to cover up the killing, and his demeanor before and after the crime, in finding that he clearly appreciated the wrongfulness of his conduct.

¶ 60 The trial court's function is to assess the credibility of the expert testimony. *See* Doerr, 193 Ariz. at 69, 969 P.2d at 1181 ¶ 64. The court's conclusion that defendant does not suffer from a mental illness, but at most, a personality disorder, requires significant deference from this court. *See* Milke, 177 Ariz. at 128, 865 P.2d at 789. This court has previously held that a defendant's conduct before and after the crime--such as lying about the crime, retrieving belongings before fleeing, and participating in conduct as to avoid capture and prosecution--will support a finding that the defendant was not impaired at the time of the offense. *See* Jones, 185 Ariz. at 489, 917 P.2d at 218. Upon reviewing the medical and other evidence, we conclude the defendant failed to establish the (G)(1) statutory mitigator.

2. NON STATUTORY MITIGATION

a. Family and Developmental History, Mental/Emotional Health

[32][33] ¶ 61 Following the decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), this court acknowledged that "even if a disorder does not rise to the level of mental disease or defect originally contemplated in (G)(1), the inquiry is not over." State v. Trostle, 191 Ariz. 4, 20, 951 P.2d 869, 885 (1997). The court will continue to assess the evidence to determine whether non-statutory mitigation may be sufficient to warrant a reduction in sentence. Id. (citing State v. McMurtrey, 136 Ariz. 93, 102, 664 P.2d 637, 646 (1983)). In addition, the court will

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determine whether the required causal nexus exists between any mental or personality disorder and the defendant's *379 **1150 criminal acts. Hoskins, 199 Ariz. at 152, 14 P.3d at 1022 ¶ 111. Our primary task when assessing evidence of mental disorder is to determine its mitigating weight. Trostle, 191 Ariz. at 20-21, 951 P.2d at 885-86.

¶ 62 The trial court reconsidered (G)(1) mitigation evidence for non-statutory mitigation and found that though defendant's proven developmental history, family background, and mental and emotional condition might otherwise constitute non-statutory mitigation, such circumstances merited no weight because causation was not established. There was no link between the dysfunction in defendant's life and his crime:

> The Court now determines that the Defendant has proven by a preponderance of the evidence that his family background, his overall developmental history and his mental and/or emotional health through the years to the present as found and described by the Court immediately above are non-statutory mitigating circumstances, though these circumstances are not near [sic] as compelling as represented and argued by the Defendant. Without a doubt, this Defendant had tough and formidable challenges to contend with in his childhood and adolescent years. *In the end, however, when the Court considers these factors separately and collectively, it is unable to make the link from them to the unspeakable criminal conduct in this murder* and they are, therefore, weighed accordingly with any other non-statutory mitigating circumstances against the aggravating circumstances proven beyond a reasonable doubt and already found to exist.
>
> Special Verdict at 7 (emphasis added).

[34] ¶ 63 A nexus is established by evidence, testimonial or otherwise, connecting defendant's mental or personality disorder with his crime. *See* Trostle, 191 Ariz. at 19-20, 951 P.2d at 884-85 (psychiatric testimony that "defendant's traumatic upbringing and resulting mental disturbance influenced his criminal actions"). In Hoskins, we stated that a nexus finding requires credible expert testimony based on reasoned medical and psychological analysis, that as between the mental disorder or dysfunctional family history and the actual crime, the former must be a cause of the latter. 199 Ariz. 127, 152 n. 8, 14 P.3d 997, 1022 n. 8.

[35] ¶ 64 Here, defendant proffered evidence of several instances of sexual abuse perpetrated by both adult women and men, a neglectful mother, and personality disorders, all of which were accepted as evidence of mitigation by the trial court. Additionally, defendant produced evidence that his own sexual history and identity were wrought with violence and confusion. The trial court accepted this evidence within the umbrella of family and developmental history and mental condition evidence.

¶ 65 Stonefeld opined that defendant's mental disorders affected his actions on the night of the murder. However, Bayless countered both Stonefeld's diagnosis and opinion of causal link, stating unequivocally that the defendant was neither experiencing paranoid delusions, nor was schizophrenia or any other mental disorder a factor which caused this crime to occur. Defendant was in control of his actions and fully understood what he was doing. The trial court accepted Bayless as the more credible expert and concluded that the required nexus, clearly and simply, did not exist between defendant's personality disorder and the crime.

¶ 66 We hold on this record that the defendant failed under the preponderance standard to prove the existence of a causal nexus and, consequently, failed to establish this non-statutory mitigator.

b. Residual Doubt

[36] ¶ 67 Defendant contends residual doubt exists as to the jury's finding of premeditation and that the trial court erred in refusing to invoke residual doubt as a mitigating factor. We have previously explained our approach to this issue, holding that when a jury verdict "finding defendant guilty beyond a reasonable doubt is supported by very strong evidence, the trial court properly refused to find the nonstatutory mitigating circumstance of residual doubt." State v. Spears, 184 Ariz. 277, 295, 908 P.2d 1062, 1080 (1996), *cert. denied*, 519 U.S. 967, 117 S.Ct. 393, 136 L.Ed.2d 308 (2000). The same **1151 *380 is true, even where the verdict is grounded in circumstantial evidence. *See* State v. Atwood, 171 Ariz. 576, 653, 832 P.2d 593, 670 (1992).

[37] ¶ 68 Here, relying on his confession, which was properly admitted for sentencing purposes, defendant argues that the victim enraged him by pulling a knife and struggling with him and that he reacted by killing her. Evidence

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introduced at trial does not support this argument. No forensic evidence reflected a struggle between victim and defendant. No evidence except defendant's confession demonstrated enragement. The victim was beaten and strangled before the killing, affording defendant an opportunity to consider what he was doing. Moreover, this was a repeat crime. Defendant had previously killed another female, also by slitting her throat. His exculpatory claims were not credible, and substantial evidence enabled the jury to find premeditation beyond a reasonable doubt.

¶ 69 We have not heretofore invoked residual doubt as a mitigating circumstance. See State v. Harrod, 26 P.3d 492 (2001). Even were we to do so, this record has no evidentiary basis for residual doubt.

c. Rehabilitation

[38][39] ¶ 70 The potential for rehabilitation during a life sentence may constitute a mitigating circumstance. *See* State v. Ross, 154 Ariz. 245, 249, 741 P.2d 1223, 1227 (1987). This court has held that the "ability to function well in a structured environment" may constitute mitigation. Jeffers, 191 Ariz. at 22, 951 P.2d at 887.

¶ 71 Here, the defendant has lived in custody for several years without incident, his MMPI results indicate controlled environments are positive for him, his personality disorders are treatable, he has expressed remorse, he has acquired religious faith, and he has educated himself by learning to read in prison. Indeed, the trial court found that defendant's good behavior as a prisoner, as well as his efforts to learn to read and become a minister, constituted non-statutory mitigation.

¶ 72 His incarceration, however, has been spent in administrative segregation, where he has had fewer opportunities to interact with others. We find that defendant's potential for permanent rehabilitation, even where mitigating, can be accorded only the slightest weight, insufficient, even in concert with other mitigation evidence, to bring about a changed result.

d. Defendant has Adapted to Incarceration

[40][41] ¶ 73 Good conduct during pretrial and presentence incarceration may be, but is not always, mitigating. *See* Spreitz, 184 Ariz. at 294, 908 P.2d at 1079; State v. Stokley, 182 Ariz. 505, 524, 898 P.2d 454, 473 (1995). Defendant presented evidence at the sentencing hearing that he has been a model prisoner. He has not been involved in difficulties or altercations while in prison and has adjusted to his incarceration. This evidence was found to be minimally mitigating. We agree.

e. Educational Advancements Since Incarceration

[42] ¶ 74 Evidence of educational achievement has been considered nominally mitigating. *See* State v. Hensley, 141 Ariz. 598, 604, 691 P.2d 689, 695 (1984). Uncontradicted evidence at the sentencing hearing established that defendant taught himself to read and write while incarcerated. These advancements are entitled only to minimal mitigation.

f. Poor Health

[43] ¶ 75 We have held that a defendant's post-incarceration illness is not relevant to the question of leniency. State v. Spreitz, 176 Ariz. 36, 45, 859 P.2d 146, 155 (1993). The defendant offered mitigating evidence that he contracted hepatitis C, which will shorten his life, and the trial court found that defendant established this fact by a preponderance of the evidence. However, it found the illness to be minimally mitigating. We disagree. The evidence is not mitigating.

****1152 *381** g. Timing of Prior Murder and Circumstances of Present Offense

[44] ¶ 76 Defendant claims that the timing of the Humphreys killing and the circumstances of the present killing should be considered mitigating. However, little argument is presented on the "timing" factor, and the argument, such as it is, is unclear. We assume defendant is referring to the fact the Humphreys murder occurred more than a year

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earlier. We accord this fact no weight in mitigation.

h. Cooperation with Law Enforcement Personnel

[45][46] ¶ 77 Admission of guilt and cooperation with the police can be a mitigating circumstance. State v. Moore, 186 Ariz. 314, 326, 921 P.2d 1151, 1163 (1996). Defendant requests that his cooperation with the police and his confession be considered mitigating. However, defendant did not cooperate with police, evidenced by the fact that he sought to hide or destroy evidence, evade detection, and initially denied knowledge of the crime. Only when he believed his guilt was discoverable through forensic testing did he attempt to help himself by confessing. This form of cooperation will not serve as mitigation.

i. Genuine Remorse

[47][48] ¶ 78 Genuine remorse may constitute non-statutory mitigation. State v. Gallegos, II, 185 Ariz. 340, 345-46, 916 P.2d 1056, 1061-62 (1996) (defendant eventually cooperated with police and expressed remorse at the sentencing hearing); Atwood, 171 Ariz. at 653, 832 P.2d at 670. The defendant expressed remorse over the killings of both Humphreys and Iler and expressed regret over the pain brought upon their families. The trial court found defendant's remorse genuine and mitigating. His expressions of remorse during the confession and at sentencing appear authentic. We conclude defendant established remorse as a mitigator by a preponderance of the evidence.

j. Religious Faith

[49][50] ¶ 79 New-found religious faith may be considered non-statutory mitigation. *See* State v. Spreitz, 163 Ariz. 260, 269, 787 P.2d 1056, 1065 (1990) (defendant found religion in prison and ministered to other inmates); State v. Gallegos, II, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984) (becoming religious, showing remorse, and being a placid prisoner was mitigating). Defendant sought religious affiliation while incarcerated. We find this form of religious faith, found after conviction and incarceration, entitled only to slight mitigating weight.

k. Overall Good Prior Character

[51][52] ¶ 80 Evidence of no prior crimes may be mitigating. Stokley, 182 Ariz. at 523, 898 P.2d at 472 (lack of prior felony convictions may constitute non-statutory mitigation). Evidence of general good character may be mitigating. *See* State v. Williams, 183 Ariz. 368, 384, 904 P.2d 437, 453 (1995). Prior to the two murders, defendant had no trouble with the law. However, in light of the two murders committed just over one year apart, any argument of overall good character must be rejected.

C. WEIGHING CIRCUMSTANCES

[53] ¶ 81 Aggravating and mitigating circumstances are evaluated both separately and cumulatively. State v. Ramirez, 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994). When at least one aggravator is found and one or more mitigators is established, this court must decide whether the mitigation is sufficiently substantial to call for a reduction in sentence. State v. Zaragoza, 135 Ariz. 63, 70, 659 P.2d 22, 29 (1983).

[54] ¶ 82 The trial court found A.R.S. §§ 13-703(F)(2) (prior conviction of serious crime) and (F)(6) (heinous, cruel or depraved) aggravation beyond a reasonable doubt and concluded that the mitigating circumstances, viewed separately or together, were insufficient to call for leniency. "This was a savagely cruel, coldblooded, and very brutal first degree murder that, when considered with the fact that the Defendant murdered the victim in Count I by also slitting her throat, warrants the severest sanction." Special Verdict at 9.

**1153 *382 ¶ 83 After thorough review, we conclude that all mitigating factors, viewed separately or cumulatively, fail to provide sufficient reason to call for leniency in light of the prior murder of Humphreys, as well as the brutal circumstances of the Iler murder and the subsequent mutilation of her body.

III. ISSUES RAISED TO PREVENT PRECLUSION

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¶ 84 Defendant makes additional arguments to prevent preclusion. None of the arguments will assist him. This court has previously considered and rejected each.

¶ 85 1. The Arizona death sentencing procedure is unconstitutional because it denies the right to trial by jury on all sentencing issues. *See* Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); ***but see*** State v. Ring, 200 Ariz. 267, 278-279, 25 P.3d 1139, 1150-1151, ¶¶ 40-44 (2001), regarding the issue raised under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and related cases.

¶ 86 2. Arizona's sentencing procedure requires proof of mitigating circumstances by a preponderance of the evidence, which improperly precludes the sentencing court from considering some mitigating evidence. White, 194 Ariz. at 355, 982 P.2d at 830 ¶ 49 (statutory requirement of proving mitigation by preponderance of the evidence does not obviate consideration of all mitigating facts).

¶ 87 3. The sentencing statute is facially invalid as irrational and as cruel and unusual punishment. State v. West, 176 Ariz. 432, 455, 862 P.2d 192, 215 (1993) (Arizona death statute not cruel and unusual on its face).

¶ 88 4. The sentencing statute violates defendant's right to individualized punishment by requiring imposition of death when one aggravating circumstance is found with no mitigating factors. *See* Bolton, 182 Ariz. at 310, 896 P.2d at 850.

¶ 89 5. The sentencing statute fails to provide defendant with an opportunity to death qualify the sentencing judge. *See* Gulbrandson, 184 Ariz. at 72, 906 P.2d at 605.

¶ 90 6. The sentencing statute fails to provide objective standards to guide the sentencing court in weighing aggravating and mitigating circumstances, places the burden of proof of mitigation impermissibly on the defendant, fails to channel the sentencing discretion of the court by failing to narrow the class of persons eligible for the death penalty, and fails to require the State to prove that a death sentence is appropriate. White, 194 Ariz. at 355, 982 P.2d at 830 ¶ 49.

¶ 91 7. The statute violates due process of law by not requiring a proportionality review. *See* State v. Salazar, 173 Ariz. 399, 416, 844 P.2d 566, 583 (1992) (proportionality review not constitutionally required).

¶ 92 8. The statute fails to require the sentencing court to find beyond a reasonable doubt that aggravating circumstances outweigh the accumulated mitigating circumstances. Stokley, 182 Ariz. at 516, 898 P.2d at 465.

¶ 93 9. The statute fails to provide a procedure by which to evaluate the impartiality of the sentencing judge. White, 194 Ariz. at 356, 982 P.2d at 831 ¶ 49 (no provision necessary for voir dire examination of the sentencing court).

CONCLUSION

¶ 94 Defendant's conviction of first degree murder is founded on substantial evidence. The State proved two aggravating circumstances beyond a reasonable doubt: (F)(2), the defendant committed a prior serious offense, and (F)(6), this murder was especially heinous, cruel or depraved. Defendant failed to prove the existence of the (G)(1) statutory mitigating circumstance. Though defendant proved that his family and developmental history presented great difficulty and that he suffers mental and emotional difficulties, he failed to establish the requisite causal nexus between these circumstances and the Iler murder. He did establish that he has been a good prisoner, has made educational progress since incarceration, possesses genuine remorse, and has gained religious faith. We have considered and weighed all mitigating factors separately and cumulatively. That analysis leads us to conclude that the mitigation is insufficient to reduce the sentence. We therefore affirm both the conviction of **1154 *383 first degree murder and the capital sentence imposed by the trial court.

CONCURRING: THOMAS A. ZLAKET, Chief Justice, STANLEY G. FELDMAN, Justice FREDERICK J. MARTONE, Justice, RUTH V. McGREGOR, Justice.

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No. 03-15

SEP 17 2003

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

DARREL PETER PANDELI, AKA DARREL PETER FLORIAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

REPLY BRIEF

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REASONS WHY THE WRIT SHOULD ISSUE

I

THERE IS A CONFLICT AMONG THE STATES REGARDING HOW TO INTERPRET THIS COURT'S DECISION IN *RING V. ARIZONA*, 536 U.S. 584 (2002).

Pandeli acknowledges differences among the states regarding whether *Ring v. Arizona*, 536 U.S. 584 (2002), requires more than a jury determination (or a finding of harmless error) as to one aggravating circumstance that renders a defendant death eligible. Pandeli argues, however, that such differences reflect variations in state procedural laws rather than a conflict involving an important federal question. (Brief in Opposition at 15.)

Pandeli's argument ignores the various state courts' express reliance on, and interpretations of, this Court's Sixth Amendment analysis in *Ring*. In the instant case, for example, the Arizona Supreme Court cited *Ring* as the basis for requiring a resentencing notwithstanding a finding of harmless error regarding at least one aggravating circumstance:

> A narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors in the circumstances described by the State. As the State contends, once the government establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view, however, *Ring II* should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, *we conclude that Ring II requires* a jury to consider all aggravating factors urged by the state and not either exempt from *Ring II*, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

State v. Ring (*Ring III*), 65 P.3d 915, ¶ 88 (emphasis added). *See also id.* at ¶¶ 91–94 (addressing whether "*Ring II* require[s] resentencing if a defendant conceded or did not challenge the aggravating factors found by the trial court?").

The state law question of when a defendant becomes "death eligible" is not at issue. The only question before this Court is whether a finding of death eligibility through a determination of harmless error regarding at least one aggravating circumstance satisfies the Sixth Amendment under *Ring v. Arizona*.

In *Johnson v. Nevada*, 59 P.3d 450, 459 (Nev. 2002), the Nevada Supreme Court similarly premised its decision to remand a capital case for resentencing on its interpretation of the Sixth Amendment requirement set forth in *Ring:*

> In light of the Supreme Court's decision in *Ring*, the instant case presents this court with the question: after a jury is unable to agree on a sentence in a capital case, does the finding of aggravating circumstances and imposition of the death penalty by a three-judge panel violate the Sixth Amendment?

Other state courts have similarly made clear that their post-*Ring* analysis turns on their interpretation of the Sixth Amendment requirements set forth in *Ring*. *See State v. Gales*, 658 N.W.2d 604, 623 (Neb. 2003) ("[W]e interpret *Ring* as affecting only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based."); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003) ("*Ring* does not . . . require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence."); *Ex parte Waldrop*, ___ So. 2d ___, 2002 WL31630710 * 7 (Ala. 2002) ("*Ring* and *Apprendi* do not require that the jury make *every* factual determination"); *Torres v. State*, 58 P.3d 214 (Okla. Crim. App. 2002), *cert. den.*, 123 S. Ct. 1580 (2003) ("Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that *Ring* requires.").

The fact that the Arizona Supreme Court stated in *Ring III*, 65 P.3d at 943, that "the procedures urged by the State [ending the harmless error inquiry after a finding of harmless error as to one aggravator] do not reflect any sentencing procedure ever adopted by our legislature," does not change the analysis. Arizona's pre-*Ring* sentencing statute provided that the judge would make all factual determinations necessary for the sentencing decision, while the post-*Ring* statute assigns that entire role to the jury. The pre-*Ring* statute's provision for judge sentencing obviously resulted in error under

Ring. The error is not with *each* of the judge's factual determinations, but rather with factual determinations that expanded the sentencing range and made the defendant death eligible. *See Ring*, 536 U.S. at 597 n.4; *see also Apprendi v. New Jersey*, 530 U.S. 466, 481 (2002) (noting that judges are free to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute).

The Arizona legislature's post-*Ring* decision to enact a statute that provides for jury sentencing in capital cases is irrelevant to the only inquiry here: whether there was Sixth Amendment error, or whether any such error was harmless under the previous statute. Arizona's new statute has no bearing on that question; the Arizona legislature could have amended the statute to provide for a jury determination of only one aggravating circumstance, with the remainder of the sentencing determinations left to the judge. That is the approach the Nebraska legislature took in response to *Ring*. *See* 2002 Neb. Laws, L.B. 1, 97th Legislature, 3d Special Session. Neither the Arizona nor the Nebraska legislative response to *Ring* is determinative of what *Ring* requires. The new sentencing statutes in those states reflect a policy decision by the legislature and only become relevant if there is a finding that error under the old statute was not harmless and a resentencing is ordered.

Pandeli further argues that the extent of harmless error review that the Arizona Supreme Court chooses to undertake is outside the scope of certiorari review. (Brief in Opposition at 13.) Pandeli relies on this Court's holding in *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990), that when constitutional error occurs in a capital sentencing, appellate courts in weighing states may either conduct harmless error review or remand for resentencing. In *Clemons*, this Court held that a state appellate court does not violate the Eighth or Sixth Amendments by undertaking to reweigh aggravating and mitigating circumstances after invalidating an aggravating circumstance. 494 U.S. at 745, 750.

The State agrees with the general proposition cited by Pandeli that an appellate court may choose to reweigh or to remand after invalidating an aggravating circumstance. That proposition is not relevant, however, in the instant case, because the Arizona Supreme Court did not invalidate either of the aggravating circumstances found by the trial court. The Arizona Supreme Court found that the first aggravator (prior conviction of a serious

offense) was outside the purview of *Ring*, and that the second aggravator (special cruelty, heinousness, or depravity) was established by overwhelming and uncontroverted evidence that Pandeli mutilated the victim's body after killing her. Thus, nothing has been deleted from the factors the trial judge weighed and balanced in sentencing Pandeli to death.

Furthermore, *Clemons* buttresses the State's argument regarding the scope of *Ring* error. In *Clemons*, this Court noted:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

494 U.S. 745. Based on *Clemons*, *Ring* error should be limited to instances in which there are *no* remaining valid aggravators, a situation that is not present in this case.

The State is not challenging the Arizona Supreme Court's right to engage in a harmless error analysis. Instead, the State challenges the Arizona Supreme Court's preliminary decision regarding what constitutes Sixth Amendment error under *Ring* in the first instance. In several Arizona capital cases pending on direct appeal at the time *Ring* was decided, the Arizona Supreme Court subsequently engaged in a harmless error analysis and was unable to find harmless error regarding the existence of any particular aggravating circumstance. The State has not sought certiorari review of that discretionary finding in any of those cases; review by this Court is only warranted where, as in the present case, the Arizona Supreme Court specifically found harmless error with regard to at least one aggravating circumstance, but nevertheless ordered a resentencing based on the Arizona Supreme Court's interpretation of what *Ring* requires.

Finally, Pandeli argues that the number of cases affected by this issue is limited. The State agrees that, given the recent legislative change to jury

sentencing in capital cases in Arizona, this Court's decision in this case will affect only a discrete number of Arizona cases. The Arizona Supreme Court has reversed some capital cases pending on direct appeal on other grounds or because it ruled that *Ring* error was not harmless as to the finding of any aggravating circumstance. Discounting those decisions, this Court's decision still directly controls the outcome of approximately 20 cases in Arizona alone. That number of cases remains of great significance to the State of Arizona and to the victims in each case.

Furthermore, as evidenced by the arguments set forth in the Brief of Nebraska, Alabama, Colorado, Delaware, Missouri, Montana, Oklahoma, and Virginia as *Amici Curiae*, the issue has significance outside of Arizona. For example, Nebraska and Montana's capital sentencing statutes currently provide for a jury determination of facts that expose a convicted murderer to the death penalty, but leave to the judiciary the role of determining the appropriate sentence. (Amicus Brief at 1.) Absent guidance from this Court, the viability of those statutes remains questionable.

Additionally, in *Summerlin v. Stewart*, 2003 WL 22038399 (9th Cir. Ariz. Sept. 2, 2003), the United States Court of Appeals for the Ninth Circuit ruled that this Court's decision in *Ring* applies retroactively to cases on collateral review. Unless this Court reverses that decision, it will place hundreds of additional capital sentences at risk if the Arizona Supreme Court's interpretation of *Ring* prevails.

II

THE ADDITIONAL ISSUES PANDELI RAISES ARE IRRELEVANT TO THIS COURT'S DECISION WHETHER TO GRANT CERTIORARI REVIEW; PANDELI'S FAILURE TO FILE A CROSS-PETITION PRECLUDES CONSIDERATION OF THOSE ADDITIONAL ISSUES.

Pages 17 through 35 of Pandeli's Brief in Opposition raise a number of issues he presents under the heading of "The Arizona Supreme Court's Disposition Of This Case Can And Should Be Affirmed On Other Grounds." The Arizona Supreme Court resolved those issues adversely to Pandeli. They are independent from the issue presented in the pending certiorari petition, and Pandeli should have raised them in a conditional cross-petition. *See, e.g., Kugler v. Helfant*, 421 U.S. 117 (1975). Rule 12(5) of the Rules

of the Supreme Court of the United States sets forth a procedure that ensures an adequate opportunity to respond to a cross-petition. Under Rule 12(5), a respondent seeking to file a conditional cross-petition must file it within 30 days after docketing of the certiorari petition. "The time to file a conditional cross-petition will not be extended." *Id.* The cover of the cross-petition must indicate clearly that it is a conditional cross-petition, and the cross-petitioner has the duty to promptly notify cross-respondents on a form supplied by the Clerk of the Court of the date of filing and the date the cross-petition was placed on the docket. *Id.*

Because Pandeli has not filed a cross-petition, and the time for filing such a petition has expired, this Court should not consider the issues raised for the first time in Pandeli's Brief in Opposition.

CONCLUSION

There is a conflict among the states regarding an important federal question, *i.e.*, whether, under *Ring v. Arizona*, the Sixth Amendment jury trial guarantee requires anything more than a jury finding (or a finding of harmless error) relating to the existence of an aggravating circumstance that makes the defendant eligible for the death penalty. The Arizona Supreme Court's interpretation of *Ring* as requiring a jury determination of every sentencing factor (including additional aggravating circumstances and the weighing and balancing of aggravating and mitigating circumstances) improperly expands the Sixth Amendment holding in *Ring*. Accordingly, the State of Arizona respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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CRM96-0913
115415

Supreme Court, U.S.
FILED
SEP 2 2003
OFFICE OF THE CLERK

(2)

No. 03-15

In The
Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

DARREL PETER PANDELI,
AKA DARRELL PETER FLORIAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF OF NEBRASKA, ALABAMA, COLORADO, DELAWARE, MISSOURI, MONTANA, OKLAHOMA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Did *Apprendi v. New Jersey,* 530 U.S. 466 (2000), create a Sixth Amendment entitlement to jury participation in every aspect of the sentence determination process, or did it instead establish a Sixth Amendment right to a jury determination of only those facts necessary to expose a guilty defendant to enhanced punishment?

In the context of a potential capital case, did *Ring v. Arizona,* 536 U.S. 584 (2002), create a Sixth Amendment entitlement to jury participation in every aspect of the sentence determination process addressing whether a guilty murderer's sentence shall be death or a lesser punishment, or did it instead establish a Sixth Amendment right to a jury determination of only those facts which first expose a guilty murderer to the enhanced punishment of death?

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STATEMENT OF AMICI INTEREST AND SUMMARY OF ARGUMENT

a. Statement of interest

The legislatures of each of the amici states have enacted criminal statutes which include death as a potential criminal sanction. These states have enacted a variety of processes to satisfy the unique Eighth Amendment procedural requirements involved in determining whether death is, or is not, an appropriate sentence in a particular case. As a part of those procedures, these states have established a specific role for their judiciary in their sentence determination process in potential capital cases.

In reliance upon their understanding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), some of these states, like Nebraska and Montana[1], elected to amend their sentencing procedures in potential capital cases but retained a significant judicial role in the sentence determination process after a guilty murderer was afforded the opportunity to have a jury find those facts which would expose that individual to the possibility of an enhanced sentence of death and render that murderer death eligible.

Other states have retained their pre-*Ring* process of dividing the role of the jury and the role of the judiciary in their capital sentencing process because their juries were already engaged in finding the facts which first exposed their guilty murderers to the possibility of a sentence of

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[1] Mont. Code Ann. section 46-1-401 (2001).

death. Still others, like Arizona, have now exercised their public policy prerogative and enacted full jury sentencing.

In Nebraska, the statutory amendment which placed the sentence determination process in the hands of our judiciary following the opportunity for a jury to determine those facts which first expose a murderer to a possible sentence of death have been found by the Nebraska Supreme Court to comply with the Sixth Amendment requirements of *Ring*. Other state courts have also upheld judicial involvement in their capital sentence determination process.

In stark contrast, other state courts have held that *Ring* creates a Sixth Amendment right to a jury determination, not only of those facts which first expose the murderer to a possible sentence of death, but also jury involvement in every step of the sentence determination process.

Yet each of the amici states have at least two things in common. Each of the amici states believe that this Court's opinions in *Apprendi* and *Ring* leave open to their respective legislatures the discretion to choose a role for their judiciary in that portion of the sentence determination process not governed by the Sixth Amendment. We believe that *Apprendi* and *Ring* teach that the Sixth Amendment mandates only that an opportunity must be afforded a criminal defendant for a jury to determine any fact which must be found in order to expose that defendant to enhanced punishment. Each of the amici states believe their current statutes satisfy that Sixth Amendment requirement.

Each of the amici states believe they are not only obligated to satisfy the Sixth Amendment rights of those

who have murdered since *Ring*, but they are also obligated to comprehend and apply the Sixth Amendment rule announced in *Ring* to pre-*Ring* sentences of death which had not become final prior to the release of *Ring*. The ability to fulfill those obligations confidently and accurately is complicated by the conflicting interpretations of *Ring* announced by the highest courts of several states. The existence of those conflicting opinions makes consideration by this Court of the questions presented essential to the uniform application of the Sixth Amendment among the amici states and throughout this country.

b. Summary of argument

Apprendi and *Ring* recognized a Sixth Amendment right to a jury determination of any fact which exposes a criminal defendant to "enhanced punishment". Those state courts which have concluded that the Sixth Amendment now requires that a jury be employed at every step of the sentence determination process have inappropriately attempted to expand the Sixth Amendment holdings of *Apprendi* and *Ring*.

This Court has recognized two distinct steps in the penalty phase process of a potential capital case: (1) the determination whether the murderer is "death eligible"; and (2) the determination of an "individualized sentence". It is only at the death eligibility step of the penalty phase process that the Sixth Amendment is implicated, according to *Ring*, because it is only at that step that the murderer becomes exposed to the risk of the enhanced punishment of death. The remaining step, the "individualized sentence" process, may appropriately be conducted by members of the judiciary, a jury, or any combination thereof a

state elects to employ because those steps do not expose the murderer to enhanced punishment. State courts are not free to significantly modify our understanding of the term "death eligible", as employed in this Court's capital jurisprudence, to expand the application of the Sixth Amendment to additional aspects of a state's sentence determination process.

REASONS FOR GRANTING THE WRIT

I. State courts of last resort have decided an important federal question in a way that conflicts with the decision of other state courts of last resort.

The highest courts of five states have held that *Apprendi/Ring* require a jury to find only those facts necessary to first expose a guilty murderer to the risk of the enhanced punishment of death in a potential capital case.

The courts of three other states have now held *Apprendi/Ring* require jury participation in every step of the sentence determination process in a potential capital case.

A. States which specifically limit *Apprendi/Ring* to the punishment enhancement/death eligibility determination.

Nebraska

In *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003), the Nebraska Supreme Court applied *Ring* to its newly

enacted first degree murder sentencing process in which a jury determines the existence of aggravating factors only[2] and concluded death eligibility was the determining factor under *Ring*.

> [A] person convicted of first degree murder in Nebraska is not "eligible" for the death penalty unless the State proved one or more of the statutory aggravating circumstances beyond a reasonable doubt.

Id., 658 N.W.2d at 624.

> [W]e interpret *Ring* as affecting only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based.

Id., 658 N.W.2d at 623. The Nebraska court specifically rejected the argument that *Ring* required that the death sentence itself must be imposed by a jury. *Id.*, 658 N.W.2d at 624. "[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury." *Id.*, 658 N.W.2d at 627.

Delaware

In *Brice v. State*, 815 A.2d 314 (Del. 2003), the Delaware Supreme Court rejected arguments that *Ring* required jury

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[2] 2002 Neb. Laws, L.B. 1, 97th Legislature, 3d Special Session, enacted to "satisfy the new Sixth Amendment requirements articulated in *Ring*."

findings with respect to all aggravating circumstances considered in the ultimate sentencing decision. "*Ring* does not . . . require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence." *Id.*, at 322.

Alabama

In *Ex Parte Waldrop*, ___ So.2d ___, 2002 WL31630710 (Ala. 2002), *cert. pet. pending*, the Alabama Supreme Court rejected the argument that the weighing function of their sentencing process (balancing aggravation found against mitigation) must be conducted by the jury.

> [T]he determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.

Id., at 7.

> *Ring* and *Apprendi* do not require that the jury make *every* factual determination; instead, those cases require the jury to find beyond a reasonable doubt only those facts that result in "an increase in a defendant's authorized punishment . . ."

Id., at 7.

> The jury . . . found the existence of that one aggravating circumstance: . . . At that point, Waldrop became "exposed" to, or eligible for, the death penalty.

Id., at 7.

The *Apprendi/Ring* reasoning of *Waldrop* was subsequently followed in *Ex Parte Hodges*, ___ So.2d ___, 2003 WL1145451 (Ala. 2003), *cert. pet. pending*.

Oklahoma

In *Torres v. State*, 58 P.3d 214 (Okla.Crim.App. 2002), *cert. den.*, ___ U.S. ___, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003), the Oklahoma Court of Criminal Appeals rejected the argument that *Apprendi/Ring* required a sentencing jury to find mitigation or to weigh aggravation and mitigation.

> *Ring* describes a substantive element of a capital offense as one which makes an increase in authorized punishment contingent on a finding of fact. Using this description, the substantive element of capital murder in Oklahoma is the jury's finding of the aggravating circumstance necessary to support a capital sentence. It is that finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death. That is, the increase in punishment from life imprisonment without parole to the death penalty is contingent on the factual finding of an aggravating circumstance.

Id., at 216.

> Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that *Ring* requires. Once that finding is made, the substantive elements of the capital crime are satisfied.

Id.

Indiana

In *Wrinkles v. State*, 776 N.E.2d 905, 907 (Ind. 2002), the Indiana Supreme Court also concluded a record which reflects that a jury found beyond a reasonable doubt the existence of an aggravating circumstance satisfied the Sixth Amendment requirements of *Ring*.

> The aggravating circumstance that made petitioner eligible for a death sentence was that he had committed multiple murders. *See* I.C. §§ 35-50-2-9(b)(8). The jury's verdict in the guilt phase, finding petitioner guilty of the three murders, necessarily means that the jury found, beyond a reasonable doubt, that petitioner had committed more than one murder. In addition, the jury was instructed that before it could recommend that a death sentence be imposed, the jury must find the existence of the charged aggravating circumstance beyond a reasonable doubt and that the aggravating circumstance outweighed the mitigating circumstances. Therefore, the jury necessarily determined the fact of the multiple-murder aggravating circumstance beyond a reasonable doubt.

Id., 776 N.E.2d at 907-908.

B. Conflicting interpretations: States concluding *Apprendi/Ring* applies to the entire sentence determination process.

In stark contrast to the cases noted above, the following state courts have concluded that *Apprendi/Ring*

require jury participation in every step of the sentence determination process.[3]

Arizona

The opinion this court is being ask to review, *State v. Pandeli*, 204 Ariz. 569, 65 P.3d 950 (2003), concluded that even though facts sufficient to render the defendant death eligible under Arizona law were clearly present on this record,[4] the case must be reversed for a new sentencing proceeding because that court felt *Ring* implicated not only the fact finding which first exposed the murderer to an enhanced punishment of death, but also the consideration of (1) evidence regarding the existence of mitigation and (2) the weighing of aggravation against mitigation which results in the determination of the sentence imposed.[5]

Nevada

In *Johnson v. State*, 59 P.3d 450 (Nev. 2002), the Nevada Supreme Court considered the extent to which *Ring* impacted Nevada's capital sentencing process, and

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[3] We note that each of these three states have, in response to *Ring*, enacted capital sentencing procedures in which juries now make all relevant sentencing decisions. We do not know if that legitimate public policy choice by their respective legislatures with respect to *future* capital cases influenced the Sixth Amendment analysis in these cases pending when *Ring* was announced. However, if that consideration did influence these outcomes it did so inappropriately and should not form a basis for our understanding of our federal constitution. See further discussion in Section II.

[4] *Pandeli*, 65 P.3d at 952.

[5] *Pandeli*, 65 P.3d at 953.

concluded *Ring* requires jury findings with respect to mitigation in addition to those facts which first expose a guilty murderer to the possibility of a sentence of death. "[E]ven though *Ring* expressly abstained from ruling on an 'Sixth Amendment claim with respect to mitigating circumstances,' we conclude that *Ring* requires a jury to make this finding as well:" *Johnson*, at 460.[6]

Colorado

In *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the Colorado Supreme Court took a similar expansive, and state law based view of the Sixth Amendment's application to its capital sentencing process. The Colorado court concluded that their judge-based sentencing process violated *Ring*, not only with respect to the factual determination of aggravating circumstances, but also with respect to the consideration of mitigation evidence, and the weighing of aggravation and mitigation. That court reached its Sixth Amendment conclusion not by employing the exposure to enhanced penalty concept of *Apprendi*, but by placing a state law interpretation upon the term "death eligibility"[7]

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[6] The Nevada Supreme Court achieved this result, in great part, by expanding their use of the term "death eligible" far beyond the established meaning of that term in capital litigation parlance. See, further discussion of this point in Section II.

[7] *Woldt v. People*, 64 P.3d at 265.

II. A state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

As early as *Wiley v. Mississippi*, 479 U.S. 906, 107 S.Ct. 304, 305 (1986), the Court has used the term "death eligible" to describe the first, narrowing step of a capital sentencing process which would satisfy the Eighth Amendment. The term "death eligible" has never been employed by the Court to describe the entire sentence determination process in a potential capital case. In *Tuilaepa v. California*, 512 U.S. 967 (1994), this Court clearly articulated the terms of art by which these questions have been discussed for nearly two decades. *Tuilaepa* recognized two distinct steps in the penalty phase process of a potential capital case: (1) the determination whether the murderer is "death eligible"; and (2) the creation of an "individualized sentence".

In *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001) (*State v. Ring I*), the Arizona court employed *Tuilaepa* concepts and *Apprendi* terms to address the Sixth Amendment claim before them, and concluded Ring became exposed to the enhanced punishment of death upon the finding of a single aggravating circumstance.[8]

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[8] "A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. . . . [A] death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt." *State v. Ring I*, 200 Ariz. 267, 279, 25 P.3d 1139, 1151 (2001).

In *Ring*, this Court reviewed the sentencing process described in *State v. Ring I*, applied *Apprendi* to capital sentencing proceedings in which a finding of a single aggravator rendered a murderer death eligible, and concluded the Sixth Amendment was violated where a murderer did not have the opportunity for a jury to find the existence of that aggravating circumstance which first exposed the murderer to the risk of an enhanced penalty of death.

As this Court recognized in *Ring* with respect to the debate between what is appropriately termed an element of an offense as opposed to a sentencing factor, it is not by what name a function is called, but what that function accomplishes in the sentencing process, which is constitutionally relevant.[9]

Now three state courts have attempted, by an expansive misinterpretation of the term "death eligible" to expand the application of the Sixth Amendment well beyond the holdings and rationale of *Apprendi* and *Ring*.

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[9] "If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting. See *ibid.* Arizona's argument based on the *Walton* distinction between an offense's elements and sentencing factors is rendered untenable by *Apprendi*'s repeated instruction that the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question 'who decides,' judge or jury." *Ring v. Arizona*, 536 U.S. at 586-587.

Arizona

Pandeli appears to be part of a pattern of the Arizona Supreme Court's ever expanding application of the Sixth Amendment.

In *State v. Ring I* that court held that it was the finding of a *single* aggravating circumstance which first exposed the murderer to a possible sentence of death and thus rendered that murderer death eligible.[10] In *Ring*, this Court held it was the fact finding which first exposed the guilty murderer to the risk of death as a punishment (death eligible) which had Sixth Amendment implications.

Yet in *State v. Ring II*[11] that court expanded its concept of death eligibility to include both findings with respect to *all* aggravating circumstances,[12] and all other steps of the sentence determination process.

> Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency.

Id., 65 P.3d at 943.

Pandeli completes that odyssey by treating judicial post-death eligibility findings with respect to mitigation and judicial weighing of aggravation and mitigation as *Ring* error.

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[10] *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001).

[11] *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003).

[12] *State v. Ring*, 65 P.3d at 943.

Mitigation evidence does not expose a murderer to a risk of enhanced punishment. It argues for a lesser punishment.

The weighing of aggravation and mitigation evidence does not expose a murderer to enhanced punishment. If the murderer had not *already* been exposed to the risk of an enhanced punishment of death, there would be no need to move on to the mitigation and weighing steps of the sentence determination process.

Nevada

In *Johnson*, the Nevada Supreme Court appears to believe it can define, as a matter of state law, when a murderer becomes "death eligible", and that the Sixth Amendment protections attributed by *Ring* to a risk of enhanced punishment or death eligibility must automatically follow their definition utterly without limitation.

We believe that there do exist limitations upon the Sixth Amendment's application to sentencing proceedings – capital or non-capital – and that state courts are not free to manipulate the Sixth Amendment's application simply by playing with the parlance adopted and employed the Court from *Wiley v. Mississippi* through *Tuilaepa v. California* to describe the capital sentencing process.

We suggest that the answer to this potential confusion is found in the "exposure to enhanced punishment" concept described in *Apprendi*. While the consideration of mitigation evidence and the weighing of aggravation against mitigation are *required* steps in the ultimate determination of an appropriate sentence in many death penalty states, they are clearly not the steps of the sentencing

analysis which first "exposes" the murderer to the possibility of an "enhanced" punishment of death. The pivotal point in the process, in *Apprendi* terms, is the factual finding that an aggravating circumstance has been proven.

Mitigation evidence does not expose the murderer to enhanced punishment. The weighing of aggravation against mitigation does not expose the murderer to enhanced punishment. As *Apprendi* teaches, the Sixth Amendment is only implicated by a step of a sentencing process that exposes the guilty criminal to a risk of enhanced punishment. If that is correct, then the Sixth Amendment has no constitutionally required role in any other step of a criminal sentencing process which does not expose a criminal to a risk of enhanced punishment.

Thus, state legislatures are free to, as a matter of public policy, still choose to create a post-death eligibility role for the judiciary in their capital sentencing process without violating the Sixth Amendment.

III. The implications of expanding *Ring*-based holdings to a non-capital context.

Although in *Ring* this Court was concerned with the proper application of the non-capital holding in *Apprendi* to a capital sentencing process, one must also be concerned about how the interpretation of *Ring* may be applied back to non-capital cases.

While the Eighth Amendment has been held to mandate wholly unique sentencing procedures, applicable nowhere in our jurisprudence except in potential capital cases, the Sixth Amendment knows no such boundaries.

Apprendi was not a capital case yet, in the end, it dictated the result in *Ring*.

Likewise, the application of the Sixth Amendment to the entire sentence determination process in potential capital cases by the Arizona, Nevada and Colorado Supreme Courts, cannot be logically quarantined within a capital sentencing context.

If the Sixth Amendment requires jury participation in every aspect of the sentence determination process in potential capital cases, there is no reason to believe it requires less in non-capital cases.

The legal, pragmatic and economic implications of that proposition were not addressed in *Apprendi* or *Ring*. We believe those considerations were not discussed in *Apprendi* or *Ring* because it was never the intention of this Court to so expand the application of the Sixth Amendment.

CONCLUSION

Apprendi recognized a Sixth Amendment right to a jury determination of any fact which exposes a criminal defendant to "enhanced punishment". Those state courts which have now concluded that the Sixth Amendment requires that a jury be employed at every step of the sentence determination process inappropriately expand the Sixth Amendment holdings of *Apprendi* and *Ring*.

The conflict between the highest courts of these states should be resolved and we urge this Court to grant a writ of certiorari in this case to resolve that conflict.

Respectfully submitted,

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September 2, 2003